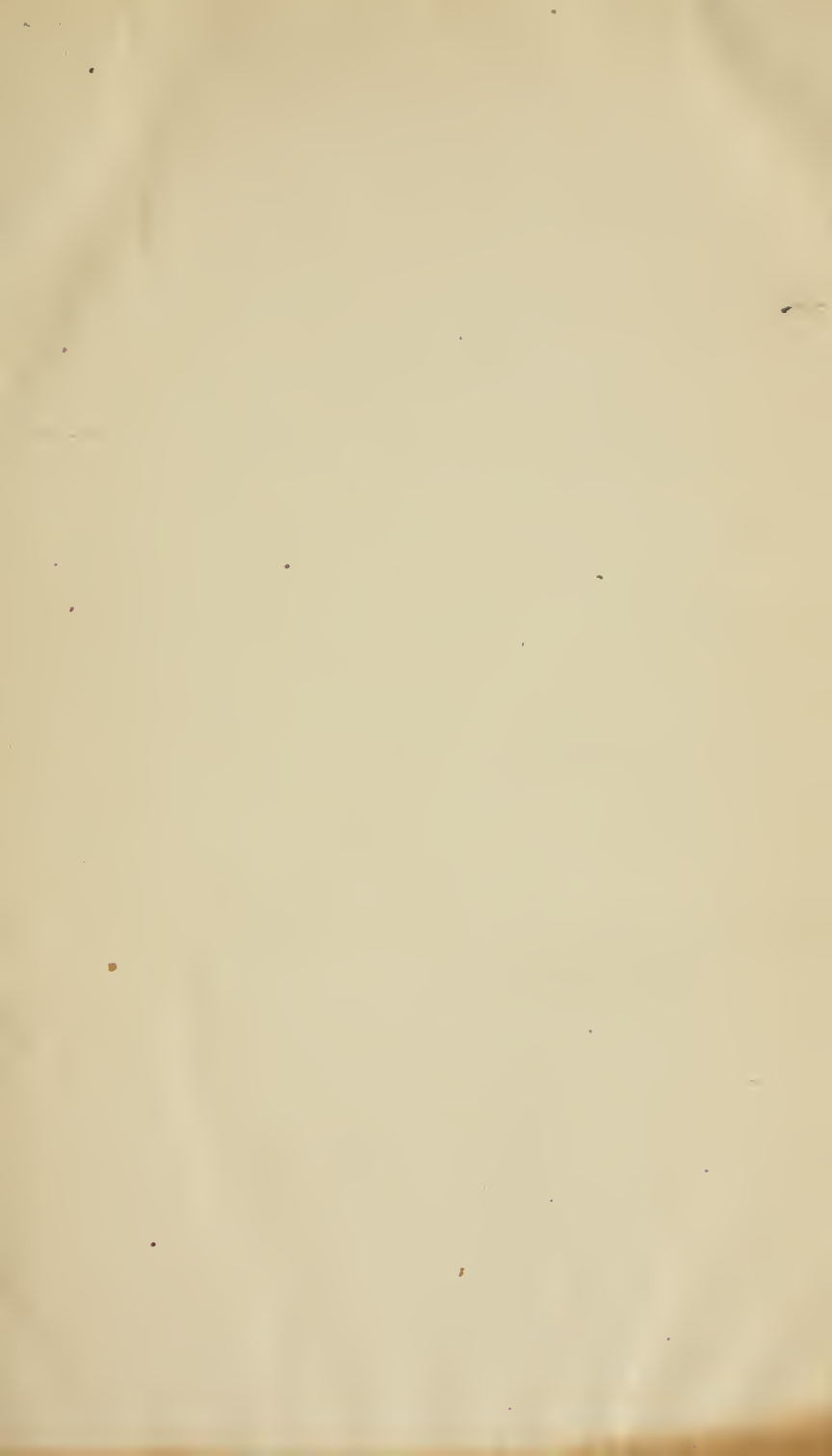
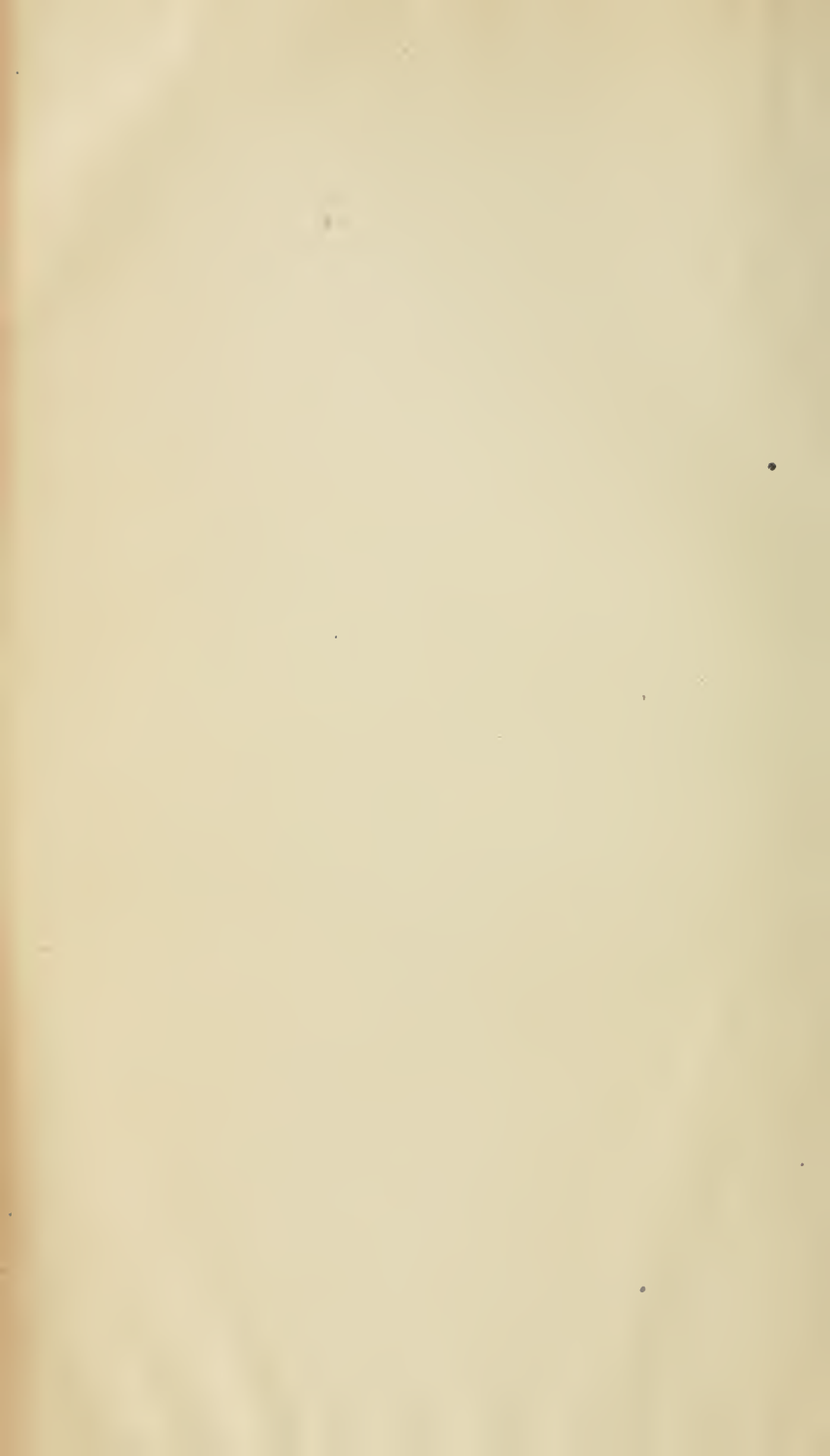










NEW JERSEY EQUITY REPORTS.

VOLUME XVIII.

C. E. GREEN, III.

REPORTS OF CASES

ARGUED AND DETERMINED IN

THE COURT OF CHANCERY

THE PREROGATIVE COURT,

AND, ON APPEAL, IN

THE COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY.

CHARLES EWING GREEN, REPORTER.

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CHANCELLOR,
DURING THE PERIOD OF THESE REPORTS
HON. ABRAHAM O. ZABRISKIE

CLERK IN CHANCERY,
BARKER GUMMERE, Esq.
iii

JUDGES OF THE COURT OF ERRORS AND APPEALS.

EX OFFICIO JUDGES.

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“ MERCER BEASLEY, CHIEF JUSTICE.

“ LUCIUS Q. C. ELMER,

“ DANIEL HAINES,

“ PETER VREDENBURGH,

“ JOSEPH D. BEDLE,

“ VANCLEVE DALRIMPLE,

“ GEORGE S. WOODHULL,

“ DAVID A. DEPUE, (*vice* Haines, term expired,) from November, 1866.

Associate Justices
Supreme Court.

JUDGES SPECIALLY APPOINTED

HON. JOHN M. CORNELISON,

“ ROBERT S. KENNEDY,

“ GEORGE F. FORT,

“ EDMUND L. B. WALES,

“ JOHN CLEMENT,

“ GEORGE VAIL,

“ JAMES. L. OGDEN, (*vice* Cornelison, term expired,) from March, 1867.

This volume contains the opinions delivered in the Court of Chancery from May Term, 1866, to October Term, 1867, inclusive; in the Prerogative Court during the same period; and such opinions in Equity cases in the Court of Appeals as were not reported in the last volume, from June Term, 1866, to November Term, 1867, and including part of that Term.

The opinions in the Court of Appeals in *Marlatt v. Warwick and Smith*, and *Metler's Administrators v. Metler*, which are noticed as appearing in this volume, will be published in the next.

References show where the cases herein reported have been cited, affirmed, reversed, or modified, down to Vol. 39 N. J. Law Reports (10 Vroom) and Vol. 28 N. J. Equity Reports (1 Stewart), inclusive.

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CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE

STATE OF NEW JERSEY.

MAY TERM, 1866.

ABRAHAM O. ZABRISKIE, ESQ., CHANCELLOR.

THE KEYPORT AND MIDDLETOWN POINT STEAMBOAT
COMPANY *vs.* THE FARMERS TRANSPORTATION COM-
PANY OF KEYPORT, AND JOEL GRIFFIN.*

1. Under the act to incorporate "the Keyport Dock Company," (*Pamph. L.* 1851, *p.* 25,) "the dock or wharf now owned by the said company" must be construed to mean now owned by the individuals composing said company.

2. By that act an adjoining shore owner is not deprived of the privilege, obtained by charter or license, of wharfing out in front of his own lands, even if it prevents vessels from landing at the side of the complainants' wharf.

4. The exclusive right of the shore owner, as supposed to exist before the wharf act of 1851, and as confirmed or conferred by that act, is to the shore and lands under water *in front* of him, giving the same right to the adjoining shore owner, and *ex necessitate* excluding him from acquiring any right taking away the right of the adjoining shore owner.

* CITED in *Stevens v. Pat. and New. R. R. Co.*, 5 *C. E. Gr.* 135; *Hoboken L. and I. Co. v. Hoboken*, 7 *Vr.* 551.

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4. The act to incorporate the Keyport Dock Company cannot be construed, by mere implication, to take away the rights of the adjoining shore owner to the water in front of him; and the power to enlarge and extend the wharf, though given by express words, must be construed so as to authorize such extension in front of lands of the company only.

5. An act incorporating a company *for the purpose* of constructing a railroad from L. to M., with no further grant of franchises, would not confer the power of taking lands by the right of eminent domain, or even grant the lands owned by the state that might be crossed by the route.

6. The question, whether in New Jersey the legislature has power to grant to a stranger the right to cut off a shore owner from access, and other advantages of adjacency, to the water directly in front of his shore along tide waters, is an open one, so far as any question is to be considered open upon which there is no direct judicial decision.

7. It would seem that in the decisions of *Gough v. Bell*, the Supreme Court and the Court of Errors were of opinion that the shore owner has vested rights in the waters in front of him that cannot be taken away by the state.

8. The only just rule of construction of a law, especially among a free people, is the meaning of the law as expressed to those to whom it is prescribed, and who are to be governed by it.

9. If the legislator who enacted the law should afterwards be the judge who expounds it, his own intention which he had not skill to express, ought not to govern. But circumstances known to all the public, such as what the law was at the time, or what it was supposed to be, are proper to be considered in looking for the intention of the legislature when not explicitly expressed.

10. Under the act of March 13th, 1866, (*Pamph. L.* 345,) and the deeds by which they claim title, the Farmers Transportation Company of Keyport have the right to erect a wharf as proposed by them, so as that it does not obstruct the navigation of the bay, or affect the rights of the Keyport and Middletown Steamboat Company, or other private rights.

Upon filing the bill, a rule to show cause was granted why an injunction should not issue, and a temporary injunction granted meanwhile. The cause is now heard upon the argument of the rule, upon bill, answer, and affidavits.

Mr. H. S. Little and *Mr. Browning*, for compliants.

Mr. J. Parker and *Mr. C. Parker*, for defendants.

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THE CHANCELLOR.

This is an application for an injunction, on a bill filed for that purpose. The complainants own a wharf on the south side of Raritan bay and of the channel of the Matawan creek, where the same enters the bay. The wharf is known as the Keyport dock. It has existed as it now is, except an immaterial addition at the west side, for fifteen years. It has a front of about one hundred and fifty-five feet, and extends out into the channel in front of it to where the water is four or five feet deep at low tide, and navigable for the boats usually employed in the trade from that place to New York, for which trade it has been used for nearly twenty years. The steamboats used by the complainants in their business are two hundred and forty feet long, and fifty-three feet beam, and can lay on the east side of the wharf; they are usually brought to in front of the wharf, where they discharge and receive their passengers and freight, by running the bow for more than half the length of the boat, along the east side of the wharf, throwing out a line, and by it backing or rounding the boat to the front of the wharf in position to discharge and receive passengers and freight, and to start on the next trip, with the least trouble and delay.

The defendants have commenced constructing a wharf on the south side of the bay and channel, east of the Keyport dock, and further down the channel. The wharf as designed, will be within seventy-three feet of the complainants' wharf at the front, and within sixty feet of it at a point about forty-five feet south from the front; and will extend into the channel so as to reach navigable water, but not so far as the wharf of the complainants by about thirty feet. The front of this wharf is to be one hundred and twenty-five feet. When erected it will practically prevent the complainants from laying their present boats along the east side of their wharf, and from rounding them to in so convenient a manner as they have before done. The channel spoken of is not the channel of the bay, but a channel washed in the flats in front

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of the shore of the bay, by the Matawan creek ; that channel runs somewhat to the northeast, along the wharf of the complainants, and then along the intended wharf of the defendants. There is sufficient room in the channel north of the wharf of the complainants and of the proposed wharf of the defendants, for the convenient navigation of the channel by steamboats of any draft that can navigate it. But the room for the management and tacking of sail vessels is narrowed by both these wharves, and both prevent steamboats two hundred and forty feet in length, from being turned at low tide in the channel, with the same facility as could be done if they were not there. At low tide, the width of the navigable channel in front of the defendants' proposed wharf is one hundred and fifty feet ; in front of the wharf of the complainants, it is from one hundred and twenty-five to one hundred and fifty feet. Both somewhat interfere with, neither obstructs navigation.

Both parties claim through grants of the owners of lands along the shore, and by acts of the legislature. Neither party disputes the title of the grantors of the other to the lands along the shore granted ; the title to considerable extent being claimed through the same grantors. The owners having granted part of their land to the complainants, with its water rights, grant the adjoining part, with its water rights, to the defendants.

The complainants claim title by two deeds to them. The first from John C. Schenck, dated May 7th, 1851, conveys "an undivided fourth part of a certain lot of land, beach, and dock or wharf," giving metes and bounds, including lands along and on the shore to low water mark. The lands along the shore or high water line, have a front of fifty feet on the shore line ; the lands on the shore, or between high and low water line, include the part of the wharf on the shore and lands forty feet east of it, and one hundred feet west of it from low water line to a boundary line drawn at right angles to the wharf, and about forty feet outside of high water line. This deed does not convey that part of the wharf which is

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beyond the line of low water. The second deed is from Gideon S. Crawford, De Lafayette Schenck, and others, dated October 7th, 1859, and conveys three undivided fourth parts of the same lands and premises, calling them the Keyport dock lot, describing it by metes and bounds substantially the same, adding to the description these words: "Also, all the water and docking privileges, charter rights, store-houses, and corporate powers, to the same belonging or in any wise appertaining;" but in no other way including that part of the wharf, below low water line. The wharf, as built at the date of both deeds, extended more than one hundred feet northerly beyond low water line, and its front extended considerably to the east of the easterly lines of the lands along the shore, and on the shore conveyed by these deeds; and it had been so built prior to February 19th, 1851, the date of the charter of the Keyport Dock Company.

In connection with these deeds the complainants rely for their rights, and rely principally, upon the provisions of the act to incorporate the Keyport Dock Company, approved February 19th, 1851, (*Pamph. Laws* 25) which act was repealed by an act approved March 24th, 1864, (*Pamph. Laws* 467) which also transferred all the property, privileges, and franchises of the dock company, to the complainants.

It is upon the construction of the act to incorporate the Keyport Dock Company, that the questions in this cause principally arise. The complainants contend that it grants the wharf known as the Keyport dock as it then stood, and the right to extend the same in front and on either side, and to prevent any other wharf from being erected on either side so as to prevent free access to the sides of the same as it then was, or should be extended.

The defendants contend that the utmost effect that can be given to the act is to authorize the complainants to maintain the wharf as it then was, and to extend it in front of their own lands, or of adjoining lands, by consent of the owners; and that it did not prevent the owners of adjacent lands along the shore, from building wharves in front of their lands, if au-

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thorized by law, alongside of that wharf, in the same manner as adjoining shore owners may do by law or proper license: that the legislature did not intend to grant away or interfere with the rights or quasi rights of adjoining shore owners, but only to license, as against the public, what else might be a common nuisance.

The first section of the act is the only one that can be, or is relied on for the grant by the state. It enacts, "that John C. Schenck, De Lafayette Schenck, William L. Horner, Benjamin Griggs, Asbury Fountain, Gideon L. Crawford, and John Crawford, and their successors, are hereby constituted a body corporate by the name of 'the Keyport Dock Company,' for the purpose of continuing, keeping, and maintaining the dock or wharf now owned by the said company, and situate in the village of Keyport, township of Raritan, Monmouth county, and extending from said village into Raritan bay, and from time to time to repair or rebuild the same, and to extend or enlarge the same when necessary for the better accommodation of boats or vessels; *provided*, that such extension or enlargement shall not interfere with the navigation of said bay, river, or creek."

There can be no doubt that "the dock or wharf now owned by the said company," must be construed to mean now owned by the individuals composing said company. The wharf or wharf lot was never conveyed to the company, but the title to it was held by the individual corporators until they conveyed it to the complainants by the two deeds above mentioned, which were both executed before the franchises of the dock company were transferred to the complainants, but no question will be raised on that account in considering the effect of this act.

The defendants contend that the act being a grant by the state of rights and franchises, and taking away or limiting rights or privileges enjoyed by the people, must be strictly construed, and that nothing shall be taken as granted unless by the clear words of the act, or necessary implication therefrom. The rule of construction is too well settled to discuss,

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or to support by citing authorities. They contend that there is no prohibition, either by express words, or by necessary implication from any provision of the act, by which the adjoining shore owner is restrained from building a wharf out alongside of the wharf, even if it prevents vessels from landing at the side of it. In this they are right. There is nothing in this act, more than in any other private dock act, or in the wharf act, that will deprive an adjoining shore owner from the like privilege, by charter or license, of wharfing out in front of his own lands. This never was the intention of the legislature ; they have not expressed it, and it cannot be added to the act by implication, for it is not necessary to the enjoyment of the right granted, in the manner it was intended to be granted. The right of sailing a vessel in the waters sixty feet east of their wharf, was a right enjoyed by the defendants in common with all the inhabitants of the state ; the legislature retained the right of excluding the complainants, as well as all others, from this part of the bay, in the same manner as they excluded the defendants and all other citizens from sailing or mooring their vessels in that part of the bay where the wharf of the complainants is. The exclusive right of the shore owner, as supposed to exist before the wharf act of 1851, and as confirmed or conferred by that act, is to the shore and lands under water *in front* of him, giving the same right to the adjoining shore owner, and *ex necessitate* excluding him from acquiring any right taking away the right of the adjoining shore owner. The same legislature that passed the charter, passed the wharf act on the 18th of March of that year, and were no doubt, at the passage of the charter, discussing and adjusting the provisions of the wharf act, and cannot be supposed by the charter to have intended, without expressing it, a grant that would deprive the adjoining owners of the benefits and rights positively conferred by that general act.

Besides, the court cannot, in construing this act, overlook the fact, that it does not confer, directly or by express words, even the power to maintain, re-build, or extend that wharf. The first section, which alone can be construed to contain

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any grant, is drawn so as to confer directly, only the power of being a corporation. Its sole express enactment is, that the incorporators are constituted a body corporate for certain purposes; and the only effect of the words expressing those purposes is, to limit the objects for which they are a body corporate. All beyond this is by mere implication. An act incorporating a company *for the purpose* of constructing a railroad from L. to M., with no further grant of franchises, would not confer the power of taking lands by the right of eminent domain, or even grant the lands owned by the state that might be crossed by the route. This act *may*, by implication, give the license of the state to maintain this wharf in navigable waters, built, as it was, in front of lands then owned by the incorporators, and interfering with the rights of no other person. But, I apprehend, it cannot be construed to have any further effect, especially by mere implication, to take away the rights of the adjoining shore owner to the water in front of him, which this legislature were carefully providing to confirm and protect.

For the same reasons, the power to enlarge and extend the wharf, though given by express words, must be construed so as to authorize such extension in front of lands of the company only. The words are indefinite; without some limit, they would authorize this company to extend their wharf for miles on either side; in fact, to monopolize the whole south shore of the bay. If a wharf was proposed a mile to the east of their dock, they might ask for an injunction, on the ground that they might, at some day, want to extend their wharf there. This cannot have been the intention of the legislature. The wharf act passed that session, and, above all, an act passed the same day, and another on the twelfth of the same month, granting to seven other persons the right to build wharves in front of their lands, on the same side of the bay, and in this very village of Keyport, demonstrate that such was not their intention; there must be some limit, and there seems no other criterion to **fix** the limit, than the rule which has been suggested by jus-

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tice and common sense, and for years adopted by the people, lawyers, and judges of New Jersey, as its common law, and by the legislature that passed the charter, in the wharf act, and the other acts alluded to; which rule is, that each shore owner shall be confined to the shore and lands under water in front of his own lands, and shall be entitled to them only.

This conclusion is arrived at by applying to the act well settled principles of construction, by which all public grants must be expounded and construed, without considering the question raised on the argument, whether, in New Jersey, the legislature has power to grant to a stranger the right to cut off a shore owner from access, and other advantages of adjacency, to the water directly in front of his shore along tide waters. If the principles of construction adopted are rightly applied, they are applied independently of this question. The question is considered by many as an open one in this state, and it is such, so far as any question is to be considered open upon which there is no direct judicial decision. It is one of the questions directly raised in this cause, and which it would have been necessary to decide, if the construction of the dock company's charter, contended for by the complainants, had been adopted. If the legislature had granted to them the right to wharf out in front of the lands of the defendants, or to the exclusive use of the waters in front of their lands, so as to prevent the defendants from using or reclaiming them, or from access over them, then it must have been determined in this cause, whether a shore owner has any vested right of access to, and use of the navigable tide waters in front of his land, that cannot be taken away without compensation.

I shall not here discuss or adjudicate this question, because, in the view I have taken of the dock company's charter, it is not necessary to the decision of the cause. But one of the grounds assumed for negating any presumption of a grant by mere implication to lands under water in front of adjoining owners is, the prevailing impression, confirmed by the legislation of that session, that the shore owner has

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some rights of adjacency and access to the lands under water in front of him. The case of *Gough v. Bell* had been decided in the Supreme Court a few months before this charter, and was determined in the Court of Errors the next year after it. If the position confidently taken by counsel, that the rulings in that case show every where that no such right existed or was acknowledged in the state, is true, it affects that ground. It is therefore proper, to sustain this ground of construction, as well as respectful to the eminent counsel, that the case of *Gough v. Bell* should be examined, so far as to ascertain whether this was the prevalent opinion of the judges and courts at that time; it might be wrong to assume that a different impression prevailed among the legislators to limit a supposed implication.

Does then the case of *Gough v. Bell* every where maintain the doctrine that the state may fill in, or authorize others to fill in, and appropriate the lands under water in front of any shore owner on navigable waters, and then cut them off from access to them? While the decision in that case does not determine the question either way, a majority of the judges who have given opinions in it, hold clearly the reverse of this to be law in New Jersey.

Chief Justice Green, in *Gough v. Bell*, 2 Zab. 461-2, says: "Notwithstanding the acknowledged title of the state, in her sovereign capacity, to the soil of navigable rivers below high water mark, there have undoubtedly existed, from a very early period, rights of the riparian proprietors, which have been recognized by the legislature, inconsistent with the idea of that exclusive property in the state sanctioned by the rule of the common law." And in the same case, on page 475, Justice Carpenter, after quoting with approval the opinion of Justice McLean, that the rights of a shore owner in the water are property that cannot be taken away, says: "If the doctrine, as thus propounded, can be maintained, the right of fishing upon his shore, the right of ferry, the right of access to the water, and even the right of accretion, belong to the shore owner, as incident to his position; it would seem to

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follow that no grant for a mere private purpose can be supported, which interferes with the established right of such owner; it would simply be to take the property of one citizen in order to transfer it to another." In *Bell v. Gough*, the same case in the Court of Errors, Justice Elmer, 3 Zab. 670, says: "By the common law of New Jersey, the owners of land bounding on such rivers have an absolute and exclusive right to wharf out and otherwise reclaim and improve the adjoining shore to the ordinary low water line:" and on page 658, he says: "That the owners of land bounding on navigable water have an *absolute right* to wharf out and otherwise reclaim the land down to and *even below low water*." On pages 675-6, Justice Potts says: "These rights" (of shore owners) "are as sacred and inviolable as any others. They are appurtenances to the estate and can no more be taken from him than any other portion of his property. He has a right, though his strict legal title is bounded by the high water line, to the water, as appurtenant to the upland; he has a right of landing, lading and unlading, and a right of way to the shore. He cannot be cut off from the water against his consent by any extraneous addition to his upland." Justice Ogden, on page 692, says that shore owners in New Jersey "have enjoyed, for their individual benefit and in private ownership, privileges upon the shore adverse to the exercise of the supreme power, excepting when employed for the protection of the common and paramount rights of navigation and of eminent domain." Justice Nevius, on page 685, says: "The owner of a freehold estate on the margin of tide water, has rights appurtenant to his freehold paramount to those of any other citizen; he has the right of ferry, of drawing seines, of passing to or from the water, of landing from or embarking in his boats, and to erect embankments, docks, or wharves, not interfering with the common rights of navigation, or any other common right; that he cannot be deprived of these rights by the prerogative of the crown, or by parliamentary or legislative power, except it be upon the doctrine of eminent domain." Again: Judge Valentine,

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although he holds that the state may have the right to build wharves in front of a riparian owner, on page 710, says: "That if the state grants this land for private purposes, it loses its regalia and sovereignty. And the grantee would have no right to convert and change the nature of the soil to such purposes as would materially injure the rights of adjoining riparian owners." Judge Cornelison alone, of all the judges who gave opinions, is silent on this point. Of eight judges who delivered opinions, only one is silent; all the others, more or less strongly, maintain that in New Jersey the shore owner has vested rights in the waters in front of him that cannot be taken away. These opinions are not a decision in the case, but they are so clearly expressed, that it cannot be said that it appears by the case that such vested rights are not acknowledged in New Jersey. It would seem, on the contrary, that had the question been necessary to the decision of that cause, both the Supreme Court and the Court of Errors would have held that there were such rights. And not only the opinions of the judges, but the history of public, professional, judicial, and legislative opinion on this matter, largely given in that case, shows that this was, and had been for years, the prevalent view in the state, and must throw light upon the intention of the legislature in this act of incorporation.

The intention of the draftsman of an act, or the individual members of the legislature who voted for and passed it, if not properly expressed in the act, it is admitted, has nothing to do with its construction; the only just rule of construction, especially among a free people, is the meaning of the law as expressed to those to whom it is *prescribed*, and who are to be governed by it. If the legislator who enacted the law should afterwards be the judge who expounds it, his own intention, which he had not skill to express, ought not to govern. But circumstances known to all the public, such as what the law was at the time, or what it was supposed to be, are proper to be considered in looking for the intention of the legislature when not explicitly expressed

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The remaining question in the case is, have the defendants a right to erect the wharf they are about constructing? They claim and show title to the lands in front of which the wharf is proposed to be built, by two deeds to them from the executors of De Lafayette Schenck: the first, dated March 27th, 1866, for a lot along the shore of Raritan bay, sixty feet in width along said bay, the west side of which is distant eighty feet eastwardly from the east side of the Keyport dock lot; the other is dated May 7th, 1866, and conveys all the land and water rights between the lot in the first deed and the Keyport dock lot. The title of De Lafayette Schenck, and the power of his executors to convey, are not disputed. The defendants claim their right to wharf out in front of their lot, not through a license from the freeholders, but by an act of the legislature, passed March 13th, 1866. At that time, George Kibbee was the equitable owner of the lands conveyed as above mentioned to the defendants, he having purchased them of the executors of De Lafayette Schenck, with whom he joined in these conveyances. This act granted "to him, his heirs and assigns, the right to build a wharf upon and in front of his lands on Raritan bay, extending into said bay a sufficient distance to accommodate vessels navigating the same; *provided* that said wharf should not obstruct the navigation of the said bay, and that that act should not affect the legal rights of any person." George Kibbee, by deed, on the 12th day of April, 1866, assigned the rights to the defendants.

It clearly confers on them the right to erect this wharf, unless it obstructs the navigation of the bay, or affects the rights of the complainants or other private rights.

As has been stated above, the wharf will not *obstruct* the navigation of the bay; it will interfere with the navigation of that part of the bay occupied by it, which to some extent was navigable before: this was intended by this act and all other similar acts, by the fact that the wharf is authorized to be extended out to accommodate vessels; every such wharf must somewhat interfere with navigation; vessels of less

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draft than such as come up to it, could in all cases have passed over the site occupied by it.

Does this wharf affect the rights of the complainants? If, as contended by the complainants, shore owners have no rights whatever below ordinary high water line, along their natural bank, or their artificial embankment or wharf, except this common of navigation which all others enjoy in like manner, and if the state can grant to any one the right to erect and appropriate a wharf or dock in front of such high water line, there is an end to the question; the legislature could grant the right to build a wharf, not only along side but directly in front of the complainants' wharf; it is just as lawful to grant the right there as to grant it in front of the natural shore line of the defendants' land. The rights protected by the proviso of this act are only rights of property, vested rights; not the rights which the complainants enjoy in common with every other citizen, such as the right of sailing over or mooring boats upon the land covered with water to be occupied by this proposed wharf. If such were the rights protected, no wharf could be built by this act anywhere.

If the shore owner has any vested rights to the water, it is only to the water *in front* of his land or wharf, not along side of it. Such a right would defeat the right of an adjoining owner in his front, and is entirely inconsistent with either view taken of the rights of riparian proprietors.

The injunction applied for must be denied.*

HOLDREGE vs. GWYNNE and others.†

1. This court will not, at the suit of a creditor, restrain the alienation of property alleged to be held in trust for the widow, if the party applying is a creditor at large, without any judgment or claim that would be a lien on the property if it was held by the debtor in his own name.

2. Property purchased by one partner with the funds of the partner-

* Decree affirmed, *post*, p. 511.† CITED in *Deveney v. Mahoney*, 8 C. E. Gr. 249.

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ship, in his own name, or that of his wife, will be considered as belonging to the partnership and held in trust for it.

3. Where an answer fully denies the facts in the bill on which the equity to sustain an injunction depends, the injunction will be dissolved, provided the denial is upon the knowledge of the defendant, but not when the denial is of facts not within such knowledge, but on information only.

4. The facts upon which the injunction depends must be verified by positive proof, annexed to the bill, or the injunction will be dissolved, even if the denial in the answer is not sufficient for want of personal knowledge by the defendant.

The complainant by his bill, filed January 19th, 1866, alleges that he entered into an agreement with William H. Gwynne, husband of the defendant, Margaret L. Gwynne, to conduct, in partnership, the manufacture of illuminating gas, under certain inventions and patents of the said Gwynne; the latter to furnish his inventions and skill, and the complainant to furnish the money required from time to time. The agreement further stipulates, that all patents and inventions which should be obtained and invented by said Gwynne, either for the said manufacture of gas or any other purpose, should be vested in the complainant and the said Gwynne equally, and that they should share equally in all profits and losses in their business. That after the commencement of operations under said agreement, sundry improvements were from time to time made, and patents obtained therefor and vested in the complainant and the said Gwynne; and that large expenditures of money were required, and the money furnished by the complainant. That the said Gwynne, during the co-partnership, had no other means of living, and drew, from time to time, from the moneys furnished by the complainant to the co-partnership business, and from moneys received in such business, and appropriated the same to his family and personal expenses, to the amount of several thousand dollars; and that his personal expenses were of an extravagant character, not warranted by his means or business, and reckless of the co-partnership interests.

The bill further charges, that Gwynne, being acquainted with the apparatus and materials required in their business,

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and the complainant not familiar therewith, the purchase and use of such materials was, in general, left to Gwynne; and that, in abuse of such confidence, the said Gwynne, with fraudulent design, did frequently bring in bills for expenses to a larger amount than was actually expended by him, and, procuring the money, appropriated the excess so fraudulently obtained to his private uses, and also appropriated, in the same way, moneys received from sales of interests in the patent rights aforesaid, belonging to the co-partnership, and from the sale of co-partnership effects, the complainant relying upon the good faith of Gwynne, and upon his making a proper and fair settlement of accounts, when the same should become advisable.

The bill further charges, that the said Gwynne, while largely indebted to the complainant on the partnership account, and insolvent, purchased valuable tracts of land, at the price of \$19,000, and procured the conveyances thereof to be made to his wife, the said Margaret L. Gwynne; and that the said Margaret had no means of her own, and paid no part of the said purchase money; but that \$11,000 of the purchase money was taken by the said Gwynne out of the moneys and assets belonging to said co-partnership, and out of proceeds of sales of partnership property and patent privileges, (the balance being secured by mortgage,) he being at that time indebted to the complainant on account of the partnership transactions nearly the whole amount actually paid on said purchase; and that the purchases and vesting of the title to said lands in said Margaret was either an actual fraud, or, under the special circumstances of the case and the existing relations between the said Gwynne and the complainant, a constructive fraud upon the complainant.

The bill further charges, that the said Gwynne died intestate, leaving no other real estate than that so purchased as aforesaid by the funds of the co-partnership, and a very small amount of personal estate, insufficient to pay his personal debts; that soon after his decease, his widow removed to New York, with her children, where she now resides, and

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took with her all the personal property of the said Gwynne. It further charges, that the said Margaret L. Gwynne, claiming to hold said lands in her own right, has entered into negotiations for the sale of, and has sold, the most valuable portion thereof, and designs to receive and appropriate the money to her own use; that in such case, the proceeds would be removed from this state, and out of the jurisdiction of this court; and that the said Margaret, being an irresponsible person, otherwise than by her pretended ownership of said lands, the complainant would be greatly embarrassed, and in all probability be defeated in recovering his claim.

The bill further charges, that the said Margaret L. Gwynne has already sold one of the said tracts of land to one Charles W. Opdyke, and taken a mortgage upon the same for \$6000, dated December 8th, 1865, payable April 5th, 1866, and that she has not assigned or transferred said mortgage, or received any of the moneys secured thereby.

The bill prays an account of the partnership dealings up to the dissolution thereof; that the said Margaret L. Gwynne be decreed to hold said lands, proceeds, and mortgage debt, in trust, to satisfy the amount upon such accounting found due, and for the appointment of a receiver; and that the said Margaret L. Gwynne may be restrained from selling, leasing, encumbering, or otherwise disposing of any part of said lands not conveyed as aforesaid, or from in any wise disposing of or intermeddling with the said mortgage taken by the said Margaret L. Gwynne upon the tract so sold by her as aforesaid, or the bond indebtedness, and the money thereby secured; and that the said Charles W. Opdyke may be restrained from paying to the said Margaret L. Gwynne, or to any other person, any part of the money secured by said mortgage.

The defendants, in their answer, admit an agreement between the complainant and the said Gwynne for the manufacture of gas, but deny that any such partnership as alleged in the bill of complaint was ever formed or entered into. They admit that the right and title to one-half interest in the patents and inventions for the manufacture of gas was vested

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in the complainant, but deny that the interest was acquired by virtue of any partnership, but by purchase from the said Gwynne; or that it was held in common, but to the sole and separate use of the said complainant. They admit that the said Gwynne drew from the moneys realized from said business transactions for his personal purposes, but deny that they were other than such as he was entitled to draw and use, and allege that the said Gwynne realized large sums of money during the whole period of said business connection, by the sale of shares or interests in the half of his various patent rights, which were his sole and exclusive property, and that the said sales were made with the complainant's knowledge and assent. They deny recklessness of the interests of the business, and of the complainant; also, all connivance or device to deceive and mislead the complainant, and all fraud, actual or constructive. They deny the sale of any interests in the patent rights belonging jointly to the complainant and the said Gwynne, secretly and unknown to the complainant, and the appropriation of any sum whatever, belonging wholly or in part to the complainant. They admit that Margaret L. Gwynne paid no part of the purchase money for the land, but that the same was paid by the said Gwynne, but deny that at the time of said purchase, or afterwards, the said Gwynne was in any way indebted to the said complainant, or that the said lands were purchased with moneys taken out of assets belonging to the said alleged co-partnership, or out of the sales of partnership property, but allege that they were bought with the proceeds of sales of divers interests out of his one half interest in the patents and inventions aforesaid, amounting to more than \$20,000.

An injunction issued pursuant to the prayer of the bill. The defendants now move to dissolve, upon answer filed.

Mr. E. T. Green, in support of the motion

Mr. W. B. Williams, contra.

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THE CHANCELLOR.

The injunction in this case depends on two grounds. The first is, that the property which the defendant, Margarét L. Gwynne, is restrained from selling, was purchased by her husband, William H. Gwynne, now deceased, in October, 1864, in her name, when he was insolvent and largely indebted to the complainant, who was his partner, or to the partnership; and that the purchase was an actual or constructive fraud on the complainant. The fact of indebtedness, though alleged and sworn to in a very indefinite manner, is perhaps sufficiently verified for the purpose of an injunction; and the purchase of the property by Gwynne, and that it was paid for with his own money and not that of his wife, is admitted by the answer. But these facts are not sufficient to sustain the injunction. It is a well settled principle that in such cases of alleged fraud in the purchase or disposition of property, this court will not interfere in favor of a creditor at large who has no judgment or other claim that would be a lien on the property if the title was in the debtor. *Wiggins v. Armstrong*, 2 Johns. C. R. 144; *Edgar v. Clevenger*, 1 Green's C. R. 258; *Young v. Frier*, 1 Stockt. 465.

If this property had been bought by Gwynne in his own name, the complainant could not now prevent his heirs or devisee from selling it free from his debt, nor could he prevent a sale by Gwynne, if living.

The second ground is, that the land was bought by Gwynne, in the name of his wife, with the funds of the partnership, and therefore a trust results in favor of the partnership, and that the complainant has a lien as partner, upon the property. Admitting the principle, that if one partner purchases property with the funds or assets of the firm, either in his own name or that of his wife, it will be held by them in trust for the firm, yet to sustain the injunction, the fact that it was so purchased with the funds of the firm must positively appear by the bill and proofs; and even then, the injunction will be dissolved if the fact is denied by the answer. The answer denies that it was purchased with the

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funds of the firm ; it is full and complete, and states fully and without evasion, that it was not so purchased ; and further, that it was paid for with the private funds of Gwynne, and states the source from which they were derived. This answer would be sufficient on this point to dissolve the injunction, were it not that the facts are not in the knowledge of the defendant. To make the denial in an answer the ground of dissolving an injunction, it must be of facts within the knowledge of the defendant. *Roberts v. Anderson*, 2 *Johns. C. R.* 202 ; *Everly v. Rice*, 3 *Green's C. R.* 553 ; *Williams v. Stevens' Adm'r*, 1 *Halst. C. R.* 119 ; *Lines v. Spear*, 4 *Halst. C. R.* 154 ; *Morris Canal v. Jersey City*, 3 *Stockt.* 14.

As a matter of pleading the defence is full and complete.

But upon examining the bill and the annexed affidavits upon which the injunction was granted, it will be found deficient in proof on this very point. There is not any proof that Gwynne paid for this property with the funds or assets of the firm. None is attempted, except by inference from the fact that he had no property to pay with, except the partnership assets and the patent rights. By the written agreement set forth in the bill, the patent rights did not belong to the partnership, but one half to each partner, individually. And there is nothing in the bill or proofs of the complainant to show that he might not have procured the money by the sale of his share of the patents. •

It is another established principle of this court in the matter of injunctions, that all the facts necessary to sustain the injunction must be verified by positive proof, or the injunction will be dissolved. *Campbell v. Morrison*, 7 *Paige* 157 ; *Bank of Orleans v. Skinner*, 9 *Paige* 305 ; *Bogert v. Haight*, *Ibid.* 297 ; *Perkins v. Collins*, 2 *Green's C. R.* 482.

The question, whether new matter can be set up as a ground for dissolving an injunction, does not arise here. The allegation, that the funds with which the land was paid for, were Gwynne's own funds, and derived from the sale of his individual property, is responsive to the charge in the bill that it was bought with partnership funds.

Let the injunction be dissolved.

Jones v. Jones.

JONES vs. JONES.*

1. The recriminatory plea of adultery to a petition for divorce on that ground, must be clearly set out in the answer.

2. In a suit for divorce on the ground of adultery, the court cannot lay hold of any matter not properly put in issue, on the ground that public policy and public morals require it.

3. An act of adultery committed by the husband and forgiven for years, should not be held to compel the husband to submit, without redress, to the faithlessness and unrestrained profligacy of his wife. It is better to hold that when the erring party is received back and forgiven, the marriage contract is renewed, and begins as *res integer*, and that it is for the party, and not for the courts, to forgive the new offence.

Mr. Larrison, for petitioner.

Mr. Keasbey, for defendant.

THE CHANCELLOR.

The petitioner applies for a divorce from his wife, the defendant, on the ground of adultery. The parties were married in this state, in 1851, and were both residents of this state at the time of the alleged adultery, and of the filing of the petition. There is no question as to the jurisdiction of the court.

The adultery is alleged to have been committed in March, April, May, and June, 1865, at Hoboken and in New York. The first question in the case is one of fact, whether the adultery is proved.

I can have no doubt as to the adultery. No one can read the testimony of Rosanna Lehman, Mary Bolen, Eliza Deigneux, and Kate O'Neill, and doubt it. The defendant and her alleged accomplice, William H. Marvin, deny it under oath. But the facts and circumstances sworn to or admitted by them, standing alone without any other evidence, would excite great suspicion, if not alone sufficient to convince any one of their guilt. And the explanations they attempt of

* CITED in *Reid v. Reid*, 6 C. E. Gr. 333.

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their long continued and peculiar intercourse, and the circumstances attending it, are too thin and transparent a disguise to deceive or mislead for a moment. The adultery is established. The only defence is recrimination, charging the complainant with having committed adultery. This is a good defence if properly brought before the court, and true in fact, and not condoned. The statute makes it so. *Nix. Dig.** 224, § 5.

But in this case the defence is not set up in the answer, and the facts upon which the defence is founded were, if true, known to the wife before the suit. The question then arises, must this defence be pleaded or set up in the answer? The ordinary rules of pleading at law and in equity would seem to require that it should be; and the decisions in the English Ecclesiastical Courts, and in the courts of the different states where it has been discussed and adjudicated, require it to be set up in pleading; the only exception seems to be when the complainant, in putting his case, shows his own guilt. *Bishop on Mar. and Div.*, § 408; *Foster v. Foster*, 1 *Haggard's C. R.* 144; *Brisco v. Brisco*, 2 *Addams* 259; *Smith v. Smith*, 4 *Paige* 432; *Pastoret v. Pastoret*, 6 *Mass.* 276; *Wood v. Wood*, 2 *Paige* 108; *Morrell v. Morrell*, 3 *Barb. S. C. R.* 236.

And the statute, (*Nix. Dig.†* 225, § 16,) says expressly, that the "answer shall fully and plainly set forth the causes of his or her defence." The answer in this case sets up the defence, that the defendant is not guilty of the adultery, but no where, in any way, charges the petitioner with adultery on his part. This defence, given by the same statute, is no where clearly or plainly set up; and is a very different defence from that pleaded. This is a suit *inter partes*; and the court cannot lay hold of any matter not properly put in issue, on the ground that public policy and public morals require it. Collusion of the kind where both parties conspire to impose upon the court, and fraudulently to procure a release from their marriage vows, against the provisions and policy of the law, is a very different case.

* *Rev.*, p. 319, sec. 30. † *Rev.*, p. 316, sec. 11.

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But if the defence was properly proved, there is a very serious question, whether it is proved sufficiently to bar the petitioner's claim to relief. The only proof attempted is by showing that the petitioner had the venereal disease three times; once at Montville, in 1855, again at Montville, in 1856, and the third time at Newark, in April, 1862. The proof is strongest as to the years 1855 and 1856. Yet there are many circumstances that throw very grave suspicion over the proof as to those two occasions. I lay the defendant's testimony out of consideration, as entirely unworthy of credit; that of the two women is too uncertain; and the whole depends on the proof of the two Gradsons. If Timothy Gradson is to be heard, and he is not impeached or contradicted, it would seem that the petitioner had the venereal disease in 1856, and proof of that disease, clearly made out and not explained, is proof of adultery. The proof of this disease in 1862, is not sufficient. It depends upon the evidence of the defendant and Dr. Tichenor; and the value of the testimony depends entirely upon the truthfulness of the defendant. Her statement is essentially different from his; and her testimony, if not so contradicted, would not be sufficient to establish this defence, against the oath of the complainant.

But if I was entirely satisfied with the proof of this disease in 1856, and without the grave doubts which I entertain, the defence is met by the fact of condonation. Mrs. Jones says she knew of this disease at the time, and how it was contracted, and she has lived with the complainant and had two children by him since. It is twelve years ago, and eight years before he went to the war, in 1862. This presents a clear case of condonation. If the adultery was clearly proved, the fact of condonation is placed beyond doubt, and this would raise the question, whether condoned adultery of the plaintiff will bar his application for a divorce for adultery of his wife.

On this question the authorities, both in England and this country, are conflicting and undecided. *Bishop on Mar.*

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& Div., § 405 to 407; *Shelford on Mar. & Div.* 442; *Beeby v. Beeby*, 1 *Hagg. C. R.* 789; *Anichini v. Anichini*, 2 *Curteis* 210; *Wood v. Wood*, 2 *Paige* 108; *Morrell v. Morrell*, 1 *Barb. S. C. R.* 318; *S. C.*, 3 *Barb. S. C. R.* 236.

But notwithstanding the statute does not expressly limit the bar to uncondoned adultery, I should be much inclined, if compelled to decide the question, to coincide with *Bishop* in his remarks in section 407 *a*, and with *Dr. Lushington* in his views expressed in *Anichini v. Anichini*, and to hold that an act of adultery committed by the husband and forgiven for years, should not be held to compel the husband to submit, without redress, to the faithlessness and unrestrained profligacy of his wife; the penalty is too severe for a forgiven offence. It is better to hold that when the erring party is received back and forgiven, the marriage contract is renewed and begins as *res integer*, and that it is for the party, and not for the courts, to forgive the new offence.

On either of these two grounds, I think in this case the bar of the adultery of the petitioner must fail as a defence.

The divorce *a vinculo matrimonii* is decreed.

DISBROW vs. JOHNSON and others.

1. The complainant, having failed to attach the required revenue stamp to the original writ, after the expiration of the time limited for the defendant to file his answer, attached the stamp and took a decree *pro confesso*; the defendant moved to set aside the decree. Motion denied with costs, but, under the circumstances of the case, without prejudice to the motion being renewed within fifteen days, if the defendant could make affidavit of a good defence, and show what that defence is.

2. Such affidavit should be entitled in the cause.

Mr. Borchertling, for complainant.

Mr. Kirkpatrick, for defendants.

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THE CHANCELLOR.

The subpoena in this case was issued without a stamp; the copy served on the defendant, Johnson, had no copy of a stamp, and his solicitor, upon inspecting the original, finding that it had no stamp, advised him that the process was void, and that he need not answer.

After the time for filing the answer had expired, the complainant caused a stamp to be affixed to the subpoena, and without further notice to Johnson, took a decree *pro confesso*.

The defendant, Johnson, moves to set aside this decree, and founds his motion upon an affidavit of these facts, but without any affidavit showing what is his defence, or that he has any good defence to the suit.

The 158th section of the Internal Revenue act of the United States, of June 30th, 1864, amended by the act of July 13th, 1866, enacts that any document issued without a proper stamp shall be invalid and of no effect.

A subpoena *ad respondendum* requires a fifty cent stamp. It is not necessary, to render the instrument invalid, that the omission should have been with intent to evade the act; the penalty can be recovered only in case of omission with such intent. But the act declares every such document, &c., repeating the enumeration first made, to be invalid, without respect to the manner in which the omission was made.

But the same section provides that any such document may be stamped by the collector of the district, and when stamped, shall be as valid as if stamped when made or issued. Congress have the right to impose and modify the penalty for disobedience to their own act, and the state courts must administer this act, as passed, without regard to the consequence to the revenue. To allow a writ or document to be made as good as if originally stamped, by the subsequent affixing of a stamp, may encourage great carelessness in affixing stamps, but congress has thought best to permit it.

When the stamp was affixed to this writ, the complainant was in the same situation as if it had been affixed to it when

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issued, and therefore he was entitled to the decree *pro confesso* when it was taken. The defendant, knowing that the writ could be so amended at any moment, ought not to have neglected to file his answer.

But the affidavit shows that his solicitor, in good faith, supposed that he was not bound to answer until sixty days after the writ should be stamped; and as this provision of the act has not, as far as known, received any judicial construction, the defendant ought not, in such case, to be deprived of his defence by the misapprehension of his solicitor.

Yet, in order to open a decree regularly entered, it is necessary that it appear that the defendant has some good defence, and what that defence is.

The motion is denied with costs, but under the circumstances of the case, without prejudice to the motion being renewed within fifteen days, if the defendant can make affidavit of a good defence, and show what that defence is. Such affidavit should be entitled in the cause.

VAN MATER and others vs. CONOVER and others.

This court will restrain, by injunction, a mortgagee from selling the equity of redemption, by virtue of judgments, in satisfaction of the mortgage debt.

Mr. R. Allen, jun., in support of the motion to dissolve.

Mr. W. H. Vredenburgh, contra.

THE CHANCELLOR.

In this case an injunction was granted to prevent the sale of the equity of redemption of certain mortgaged premises, by virtue of judgments obtained by William W. Conover against the complainant, Benjamin H. Van Mater, who owns the equity of redemption. The judgments were upon the bonds secured by the mortgages held by Conover, and were

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for the same debts that were secured by the mortgages. The question is, whether this court ought to restrain the sale of the equity of redemption in such case.

This court, in *Severns v. Woolston's Ex'rs*, 3 *Green's C. R.* 221, held that such sale should be restrained; and that decision is warranted by, and founded upon, the reasoning of Chancellor Kent in *Tice v. Annin*, 2 *Johns. C. R.* 125.

I think the rule thus established, a wise and salutary one. Such a sale would deter fair outside bidders from purchasing, by the confusion it would naturally occasion as to the effect of the amount of the bid upon the amount of encumbrance to which the purchase would be subject. Any one, upon deliberate calculation and cool consideration, could no doubt adjust the matter correctly. But the solution of the problem would cause real difficulty in the haste of bidding at a sheriff's sale. The precedent established in *Severns v. Woolston's Ex'rs*, in this court, must be followed, and the injunction retained.

The motion to dissolve is denied with costs.

WEBER vs. WEITLING and others.

1. It is the practice upon filing a report on exceptions to an answer, to take an order that the same shall be confirmed, unless cause be shown in eight days after the service of the same.

2. The appeal given by the act (*Nix. Dig.* 99, § 29,) is taken by filing exceptions to the master's report within eight days from the service of the rule, which is the mode of bringing objections to the reports of masters before the Chancellor to review.

3. Filing exceptions to a report is a sufficient and the usual showing cause against its confirmation.

Upon a report by the master sustaining the exceptions of the complainant to the answer of the defendants, an order was entered confirming the report, without notice of filing the report, or taking and serving the usual order *nisi*. It is

Weber v. Weitling.

now moved to set aside the order to confirm the report, as made irregularly.

Mr. Lyons, in support of the motion.

Mr. Dixon, contra.

THE CHANCELLOR.

The settled practice in chancery, both in England and this state, is, upon filing a master's report that may be reviewed by the Chancellor, to take an order that the same shall be confirmed, unless cause be shown in eight days after the service of the same; this is what is called the rule *nisi*. Among the few exceptions to this rule in the English practice, was the report on exceptions to answers; this needed no confirmation.

The reason was, that it was necessary to issue a subpœna for a new answer, which gave time for the defendants to except to the report, and was sufficient notice of it. As the subpœna in such case is abolished by the practice in this state, the reason for the exceptions does not exist, and the general rule requiring the order *nisi* in such case, must be held to apply to a master's report on exceptions to the answer. The chancery act,* section 29, expressly gives an appeal from the report to the Chancellor.

This appeal is taken by filing exceptions to the master's report within eight days from the service of the rule, which, by the established practice of the court, is the mode of bringing objections to the reports of masters before the Chancellor to review. Filing exceptions to a report is a sufficient and the usual showing cause against its confirmation.

The order to confirm must be set aside.

* *Rev.*, p. 110, sec. 34.

Carr v. Weld.

CARR vs. WELD and others.

1. An answer, simply averring that the facts stated in a paper, purporting to be the answer of another defendant in the cause, "are substantially correct as far as these defendants are concerned," is formally and substantially defective.

2. Even upon a full denial of the equity of the bill, the court will, in its discretion, retain the injunction until the final hearing.

Upon filing the bill in this cause, an injunction issued to stay execution upon a confessed judgment. Answers were filed by all the defendants. Edward D. Weld, one of the defendants, then moved to dissolve the injunction.

Defendant, pro se, in support of the motion.

Mr. J. Wilson, contra.

THE CHANCELLOR.

The answer of R. A. Poole, and Mary Elizabeth his wife, which latter is the real defendant in point of interest, is both formally and substantially defective; it simply avers that the facts stated in a paper, which is called the answer of E. D. Weld in this cause, are substantially correct as far as they are concerned. Comment on such an answer would be superfluous. Besides, their answer was sworn to before the answer of E. D. Weld was sworn to or filed, and therefore before it had any existence as an answer; it was the draft of an answer, subject to alteration and correction.

Even if there was a full denial of the equity of the bill correctly before the court, this is one of the cases in which the discretion always exercised in such matters, should induce the court to retain the injunction until the final hearing.

The case is by no means free from suspicion, and were the injunction dissolved, the complainant might lose all remedy.

The motion is denied.

Goldbeck v. Goldbeck.

GOLDBECK vs. GOLDBECK.*

1. The evidence in this case *held* not sufficient proof of residence necessary to give the court jurisdiction; neither party residing here at the time of the desertion.

2. Where it is shown that there was no marriage ceremony, proof of cohabitation as man and wife will not prove marriage; it is necessary that a contract, consented to by both parties, should be shown.

3. When a husband upon disagreement with his wife, and her declaring that she will not live with him, assents to her going where she chooses, and furnishes her with money for her support, and never insists as a condition of her support, that she shall perform her duties as a wife, although he asks and entreats her to come back, it has too much the character of a friendly arrangement to be called willful, obstinate, and continued desertion.

Mr. A. Voorhees, for complainant.

THE CHANCELLOR.

In this case there is no sufficient proof of three years residence in the state, which is necessary to give the court jurisdiction, when neither party resided here at the time of the desertion. She appears to have gone to Hohokus late in the summer or in the autumn of 1862.

Mary E. Pake says she came there late in the season—boarded there six weeks, and left there in October, 1862. She came to see about board the next spring. If this means that she left Hohokus in October and came back there next spring, there is no residence for three years.

Stewart, station master at Godwinville, says she left there in June, 1865. If he is correct, she could not have resided there for three years. No facts are testified to, to show that she ever resided in New Jersey for three years. Glassy swears that he knows that she did, but does not testify to a single fact to show that he knows it. He is evidently not testifying from personal knowledge.

The evidence of the marriage is not satisfactory. If, by the

* CITED in *Driver v. Driver*, 1 *Stew.* 398.

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law of New York, a contract in *verba de presenti* followed by cohabitation constitutes a marriage, yet there is no proof of such contract. Where it is shown that there was no marriage ceremony, proof of cohabitation as man and wife will not prove marriage; it is necessary that a contract consented to by both parties should be shown.

The desertion in this case is not such as is intended by the act as a ground for divorce. When a husband, upon disagreement with his wife and her declaring that she will not live with him, assents to her going where she chooses, and furnishes her with money for her support, and never insists, as a condition of her support, that she shall perform her duties as a wife, although he asks and entreats her to come back, it has too much the character of a friendly arrangement to be called willful, obstinate, and continued desertion.

VREELAND vs. VREELAND.

1. In a suit against a husband for alimony under the tenth section of the divorce act, it is proper to allow to the wife counsel fees, and also temporary alimony, *pendente lite*.

2. Counsel fees and alimony, *pendente lite*, are only allowed to a wife, and where the answer denies the fact of marriage under oath, and the fact of marriage is the main controversy in the cause, they will not be allowed, except upon satisfactory proof of the fact of marriage, or that the defendant cohabited with the complainant as his wife, or publicly acknowledged her as such.

An order for a weekly allowance as alimony, *pendente lite*, was made by the late Chancellor, to continue until May Term, 1866. At that term, an application was made to continue and increase the alimony, and for the allowance of counsel fees. Affidavits were produced, showing the necessities of the complainant and the ability of the defendant. The defendant's answer, denying the fact of marriage, and charging the complainant with procuring some one to personate him at a pretended marriage, fraudulently got up, was read.

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Mr. Dixon, in support of the motion, cited *Smith v. Smith*, 1 *Edw. C. R.* 255; *Smyth v. Smyth*, 2 *Addams* 254.

Mr. C. Parker, contra, cited *Bishop on Mar. and Div.*, § 560, 569, 570, and 579; *Nix. Dig.* 224, § 10.

THE CHANCELLOR.

This is an application by the complainant, for the continuance and increase of alimony, *pendente lite*, and for counsel fees to enable her to prosecute her suit.

The bill is filed to compel the defendant to furnish support and maintenance to the complainant, who alleges that she is the lawful wife of the defendant, and entitled to this relief under the tenth section of the divorce act.

In a bill of this kind it is no doubt proper that alimony, *pendente lite*, and suitable counsel fee should be allowed to the wife, as well as in suit for divorce. They come within the reason of the rule, and the case of *Denton v. Denton*, 1 *Johns. C. R.* 364, seems an authority for it. The only question is, whether, under the circumstances of this case, as it now appears before the court, it should be ordered.

The late Chancellor, upon the facts then appearing in the case, ordered a counsel fee and alimony, but limited the latter to the first day of this term; evidently intending that the continuance of it should depend upon the case as it should then stand.

The answer fully and explicitly denies the fact of marriage, and charges the complainant with the attempt to prove a marriage, by procuring some one to personate the defendant at a pretended ceremony, got up for such fraudulent purpose. This answer is under oath, and the evidence, so far as taken on that point, is conflicting and contradictory. There is no proof that the complainant was ever acknowledged or treated by the defendant, openly and publicly, as his wife, for any period. There is no proof of cohabitation, or living together as man and wife. There is proof of meretricious intercourse before the alleged marriage, and that like intercourse was continued afterward.

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The only foundation for the order for alimony and counsel fee, *pendente lite*, is that the marriage has existed in fact between the parties. Where the real controversy in the suit is, as here, between the parties, whether that relation exists, or ever did exist, the order cannot be made upon the mere allegation or *ex parte* affidavits of the wife. Else every man might be made to pay the expenses of any woman who claimed him as her husband, and sues for maintenance, and to support her as long as the suit could be spun out.

But in all such cases, where the fact of marriage is denied, under oath, it should appear, to the reasonable satisfaction of the court, that a marriage in fact has taken place, or that the woman has been openly treated, by the alleged husband, as his wife. *Bishop on Mar. and Div.*, § 570, 579. There is no precedent for allowing alimony or counsel fee where the fact of marriage, or cohabitation as man and wife, is denied.

In the case of *Smyth v. Smyth*, 2 *Addams* 254, the court, because a marriage *de facto* was neither proved against, nor confessed by, the husband, refused to make an order for alimony, but, there being no denial of marriage, and it being alleged or *pleaded* against the husband, *recommended* that it should be allowed during vacation. The case of *Smith v. Smith*, in 1 *Edw. C. R.* 255, does not seem to be either well reported or fully considered, yet it would not support this application, though it goes further than any other. There was in that case no answer, but a plea denying *the fact* of marriage, and sworn to. But it did not deny that they had cohabited, or lived together as man and wife.

The application is **denied**.

DEMAREST vs. TERHUNE.

1. To set aside a deed to a creditor on the ground of fraud, it must satisfactorily appear from the whole testimony, that the grantee took the conveyance of the property with a view to protect the property of the debtor from his other creditors, and not to save his own debt.

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2. The fact that the grantee in a conveyance of real estate, alleged to be in fraud of creditors, is of kin to the grantor, is not of itself, alone, evidence of fraud.

3. Where a conveyance is sought to be set aside on the ground of fraud, the question must be, was the deed made honestly to secure a debt, or was it made to defraud creditors.

This cause was argued before A. S. Pennington, esquire, one of the masters of the court, who was called by the Chancellor to advise with him.

Mr. C. H. Voorhis, for complainant

Mr. L. Zabriskie, for defendant, Albert G. Terhune.

THE MASTER.

The bill is filed by John J. Demarest, a judgment creditor of Gilliam C. Terhune, to set aside a conveyance of certain property by Gilliam C. Terhune and wife to Albert G. Terhune, lying in the town of Hackensack.

The bill alleges that the land and premises were sold by Gilliam C. Terhune and wife to Albert G. Terhune, for the nominal consideration expressed in the deed, of \$3000, while said lands are worth at least \$5000; and charges, that the said deed was voluntary and without consideration, and was made for the purpose of hindering and defeating complainant in the collection of his debt, and to defraud him. The defendant, Albert G. Terhune, by his answer, admits that he knew of the indebtedness of Gilliam C. Terhune to the complainant, but denies that the said deed to him was voluntary or without consideration, or was in any way, directly or indirectly, made for the purpose of hindering or defeating the complainant or any other creditor of the said Gilliam C. Terhune, in the collection of his or their debts, credits, or claims, or to defraud him of any one of his just claims.

The answer further states, that on the 20th of November, 1863, Gilliam C. Terhune was justly indebted to him in the

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sum of \$2220, for money actually loaned and advanced by him to the said Gilliam before that time, and for which Gilliam gave him a mortgage; that \$1000 has been paid on this mortgage; that said mortgage was registered in Bergen county; that afterwards, Gilliam became indebted to him in the further sum of \$200, advanced by him for the support of his family, he being away in the service of the United States; that Gilliam C. Terhune had given a mortgage to Abraham Westervelt for \$1000, which mortgage had been assigned by the executors of Abraham Westervelt to him, upon which there was due, at the time of making said deed to him, the sum of \$1194.64.

It further states that said lands were, at that time, subject to another mortgage, given by Gilliam C. Terhune to Robert Campbell, for \$500; that there was due on said mortgage, at the time of giving said deed, the sum of \$705.54; that said lands were subject to a judgment obtained by Cornelius D. Taylor against said Gilliam C. Terhune, on which the said Albert G. Terhune has had to pay the sum of \$78, to free said lands therefrom; that the whole of his claim, together with the said encumbrances and interest thereon, amounted to the sum of \$3492.04, at the time of giving said deed; that these claims and encumbrances made the consideration of said deed; that the value of the said property, at the time of giving said deed, did not exceed \$3000; and that his object in taking said deed was, to satisfy the said sums so due to him, and not to defraud, hinder, or delay the complainant or any other creditors, or to hold the property in trust for said Gilliam, or in any way for his benefit.

Testimony has been taken on the part of the complainant, and also on the part of the said Albert G. Terhune. There is no testimony in the case to show that the deed was voluntary and without consideration, and in the argument it was not pretended that the consideration for the deed was not properly set forth in the answer.

The complainant insisted, that there was not actual fraud,

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but legal fraud, and that there were in this case the following *indicia* of fraud :

1. That the consideration was inadequate ; the true value of the property being \$5000.

2. That Albert G. Terhune was the uncle of Gilliam C. Terhune.

3. That Albert G. Terhune had knowledge of complainant's claim.

To set aside a deed on the ground of fraud, it must satisfactorily appear, from the whole testimony, that the grantee took the conveyance of the property with a view to protect the property of the debtor from his other creditors, and not to save his own debt.

1. As to the value of the property.

Testimony for the complainant. R. R. Paulison fixes the value at, at least, \$5000. C. L. Blauvelt estimates it at \$5000, including the value of the buildings \$1000, and barn \$400, to put it there now. Hazen W. Adams would have given \$4000 for it ; says he was rather partial to the place, having lived there before.

Defendant's evidence. John Huyler states, the property in August, 1864, was not worth more than \$3500. It could have been rented for \$300. I would call that a pretty tall rent for it. The Moore lots opposite are more desirable than this. William DeWolf thinks, in May, 1864, the value was \$2500 ; that it has risen in value since 1864, and that it is not worth more now than \$3500. William S. Banta told Albert G. Terhune that the property was not worth over \$3000 at the time the deed was given, and he thinks that was its full value at that time ; thinks \$1000 the full value of the buildings.

It appears from the evidence, that the Moore property, opposite this property, was sold in the spring of 1864, at public vendue ; that the property in dispute is one hundred feet by two hundred feet ; that the Moore lots, opposite, sold at public vendue, one lot fifty feet by two hundred and seventy-five feet, for \$875 ; another about the same size, for

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less than \$1000, price not stated, and that they were sold cheap. These Moore lots being two hundred and seventy-five feet deep, would make the lot of Terhune worth not more than \$2000 for the whole lot, one hundred feet by two hundred feet, in the same proportion, making all due allowances.

These witnesses are probably the best judges of the value of property in Hackensack, who could have been selected, and this case shows how, in speculative times, the best judges differ as to the value of property.

If these lots were worth in 1864, \$2000, then the buildings thereon, being of the value of \$1000 to \$1400, according to the testimony, would bring the value of the property at the time of the sale, from \$3000 to \$3400, less than the price actually given, \$3492.04. There is therefore no inadequacy of price that could reasonably be considered as any evidence of fraud.

2. That Albert G. Terhune is the uncle of Gilliam C. Terhune.

In a doubtful case, or where the facts in the case show fraud, relationship is some evidence of fraud, for it is probable that a party intending to perpetrate a fraud, would look for aid and connivance to a relation rather than to a stranger. But the mere fact of relationship is not of itself alone, evidence of fraud; there must be other strong *indicia* of fraud, for a man has a right to secure a debt due from a relation as well as from a stranger.

3. That Albert G. Terhune knew that the complainant had a claim against Gilliam.

It appears, by the testimony of Mr. Banta, that the deed was drawn before the suit of the complainant was instituted. This is very feeble evidence of fraud, for the fact of a man being indebted is a strong inducement for a creditor to get security for his debt.

In cases of this kind it must depend upon the intention of the parties to the conveyance; the question must be, was the

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deed made honestly to secure a debt, or was it made to defraud creditors?

I would remark, that there is no evidence to show that anything was reserved to Gilliam C. Terhune, or that there was any reservation or stipulation in any event, in his favor. The defendant, Albert G. Terhune, has not been examined on this subject.

The testimony of Mr. Banta shows that Albert G. Terhune was anxious to secure his debt; that he applied to his counsel for advice; that his counsel advised him to get a mortgage; that he did thereupon get a mortgage, and had it recorded; that finding there was some question as to the legality of the acknowledgment, he sent his counsel to Camden to get a proper acknowledgment, and then had the mortgage again recorded; that Albert G. Terhune, being anxious to have the property sold to get his money, again applied to his counsel about it; that his counsel stated to him that his claim and the other encumbrances were all the property was worth, and that he would have to foreclose the mortgage; and that his counsel then told him that if he could make an arrangement with Gilliam to give him a deed for the property, it would save the delay and expense of the foreclosure.

It appears from the evidence, that the proposal to get the deed did not come from either Albert G. Terhune or Gilliam C. Terhune, but from Mr. Banta, and that it was done under the belief that the property was not worth more than enough to secure Albert G. Terhune, and to save him the expense and delay of foreclosure.

It was contended, on the part of the complainant, that the conversation of R. R. Paulison with Albert G. Terhune, after he had advertised the property for sale, in which he expressed his willingness to apply the overplus, after paying himself, (if any there should be) to the payment of Gilliam C. Terhune's debts, is evidence of a fraudulent intent; but I think it is a strong fact to show that his object in this whole business was to save himself from loss; for if he had designed to defraud the creditors, he would have at once refused so to do. It was

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a gratuitous offer, and should have been received in a proper spirit, or, as Mr. Paulison says, they ought to have been satisfied.

I do not see in this transaction any sufficient evidence of fraud, and would respectfully advise the Chancellor, that in my opinion, the complainant has failed to maintain his case, and that the complainant's bill should be dismissed.*

MOORE vs. ZABRISKIE.†

A trustee, who has abused his trust, is entitled to no commissions as trustee, but he will be allowed reasonable compensation for special and extraordinary services rendered to the *cestui que trust*.

This cause came on for a hearing before A. S. Pennington, esquire, one of the masters of the court, upon an exception to the report of the master, allowing the defendant a charge of \$500 for his services in defending the complainant upon a trial for murder.

Mr. E. T. Green, for exceptant.

Mr. L. Zabriskie, for defendant.

THE MASTER.

There is but one exception taken in this case; the master has allowed the defendant five hundred dollars as a compensation for his services.

It appears by the decretal order of this court, that divers conveyances and assignments were made by the complainant to the defendant, and that the defendant claimed to own the property so conveyed; while the decree decides that he was only a trustee for the complainant.

* Decree reversed, *post* p. 532.† CITED in *McKnight's Ex'rs v. Walsh*, 8 C. E. Gr. 148.

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It is contended by the complainant's counsel, that inasmuch as the defendant has abused his trust, he ought not to be allowed anything as such trustee. To this I fully agree.

But it appears by the papers in this case, that the complainant was indicted for murder in the county of Bergen; that he was deserted by his relations, and applied to the defendant to aid him in his defence; and the decree in this case settles the fact that these conveyances and assignments were made, in whole or in part, to raise money for the complainant's defence in said trial for murder.

The Chancellor, in said decree, has decided that the complainant is entitled to a reconveyance of the property, upon his paying the defendant such sums of money as he has expended for the use and benefit of the complainant, and directs a reference to the master, to take an account of the moneys expended by the defendant to and for the use of the complainant, and further directs that the master should make a proper allowance to the defendant *for his services* to the said complainant; and the Chancellor decrees that the defendant should pay the complainant his costs to be taxed.

As I understand this decree, the Chancellor does not mean to allow the defendant any commissions or allowances as trustee, because he has not been faithful to his trust, but as the defendant did render important *service* to the complainant about the said suit, he directed the master to make a proper allowance to the defendant for *his services* to the said complainant.

The master was then directed to make an allowance for these services.

The only question left to the master was the amount. Has he allowed too much?

The charge of murder is a very serious one, and if the defendant undertook the trust of attending to this case, he ought to be liberally compensated.

It appears by the papers that the complainant was deserted by his relatives, and the whole care, anxiety, and burthen of the defence, fell on the defendant.

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The defendant considers that by his exertions the complainant escaped capital punishment. He neglected his own business to some extent, in New York, to attend to this case, gave it a great deal of his time, employed counsel, raised money on the property, looked up witnesses, took care of the defendant in jail, &c. Mr. Banta, prosecutor of the pleas of the county of Bergen, testifies that the defendant's services in this case for the complainant, were worth \$1000.

Under these circumstances, I cannot say the allowance made by the master, was too much.

I would therefore respectfully advise the Chancellor to disallow the exception to the master's report.

C A S E S

ADJUDGED IN

THE COURT OF CHANCERY

OF THE

STATE OF NEW JERSEY.

OCTOBER TERM, 1866.

COSTER *vs.* THE TIDE WATER COMPANY.

1. The legislature has no power, by special act, to transfer to one man the property of another, without his consent, either with or without compensation. This want of power does not depend upon any constitutional restriction, but upon the fact that it is not the exercise of the power of making laws, or rules of civil conduct, which is the branch of sovereign power committed to the legislature.

2. A grant of power to one man to improve the property of another, without his consent, at an annual compensation to be fixed by commissioners to be appointed for that purpose, not limited to the cost of the improvement, or the interest on the cost, or the benefit received by the property, but to be fixed by the arbitrary discretion of the commissioners, is a grant to one of profit out of the land of another, to the extent that such compensation may exceed the cost, or interest on the cost. It therefore, is beyond the power of the legislature, and void.

3. The grant to one of the power to manage and improve the property of another, without his consent, and contrary to his judgment, even if exclusively for his benefit, is an infringement of the right of acquiring, possessing, and enjoying property, guaranteed to every one by the constitution.

4. The power of eminent domain is a legislative power ; these powers, by the constitution, are vested in the legislature. Private property may be taken for public use, but only on adequate compensation.

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5. The public use for which property may be taken by the power of eminent domain, is the use of the property itself by the government, or by the general public, or some portion of it; not by particular individuals, or for the benefit of certain estates.

6. Whether the use for which property is taken is a public use, is a question of law, to be settled by the judicial power. Where the use is a public use, the legislature are the sole judges of the necessity or expediency of exercising the power of eminent domain in the particular case. But it cannot evade the constitutional limitation of its power, or make a private use a public one, simply by enacting that it is such.

7. The laws regulating partition fences, party walls, the enclosure of woodlands, the ditching and embanking of meadows, and other like police regulations, whether general or special laws, are an ancient branch of legislation. Their object is to regulate the management and enjoyment of property by the owners, or a majority of them, at their common expense, and they are a proper and constitutional exercise of legislative power.

The complainant filed his bill in this cause to restrain Atterbury, Merrill, and McIntosh, the commissioners appointed under the charter of The Tide Water Company, the other defendant, from making a contract with that company, to dyke and drain the lands of the complainants and others, against their will. A temporary injunction was granted. No answer was filed, and no depositions were taken. The cause is heard upon a motion to dissolve the injunction.

Mr. Williamson, in support of the motion.

Mr. McCarter and *Mr. Vanatta*, contra.

THE CHANCELLOR.

The complainant, as devisee of John G. Coster, claims an undivided interest in fee, in thirty-nine hundred acres of marsh or meadow land, bounded in part by the Passaic river, Newark bay, the Hackensack river, and Saw-mill creek, a tide water tributary of the Hackensack, and in part, on the west side, by lands of Francis S. Lathrop and others.

Peter C. Schenck, and nine others of the defendants, by an act, claimed by them to be passed on the fourth day of

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April, 1866, according to the constitution, were incorporated by the name of "The Tide Water Company." The preamble to this act recites that "the tide water marshes adjoining Newark bay, and its tributary streams, cannot profitably be drained by individual owners thereof; that the revenues of the state would be largely increased from the taxes on said marshes, when properly fitted for occupancy and use; that the maintenance of such drainage will be a public work, requiring continuous and constant care to protect the interests of the large number of persons who may use and occupy said lands, and who, by such use and occupancy, would add considerably to the wealth and population of the state; that the frequent overflowing of said marshes materially interferes with the construction, maintenance, and use of suitable highways of travel thereon, for the accommodation of the people; and that said marshes, in their present condition, are detrimental to the public welfare of the populous communities in their vicinity.

The sixth section of the act provides, that the company may reclaim and drain the wet or overflowed lands in and about the tide water marshes of Newark bay, and of the streams flowing into said bay, except those within the counties of Bergen and Essex, and receive an annual compensation therefor, as thereafter provided, and may construct and maintain all works necessary or convenient thereunto.

The eighth section enacts, that any justice of the Supreme Court may appoint three commissioners of said lands, and fix their compensation, their term of office to be for nine years; thirty days notice of the application to be given in two newspapers in each county.

The ninth section provides, that said commissioners may contract with said company for the construction, maintenance, and management of suitable dykes, drains, ditches, dams, sluices, engines, pumps, and all other machinery, works, and structures, necessary or useful in the improvements required to fit said lands for occupancy and use, and for the maintenance of the drainage therefrom, and may contract for the

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drainage thereof, and shall pay said company such annual compensation therefor as said contract shall specify; and they shall report said contract to any justice of the Supreme Court for confirmation, and it shall not take effect until confirmed.

The tenth section enacts, that said commissioners, after the reclaiming of said lands, or any part thereof, shall have been completed according to said contract, shall assess, upon the lands so reclaimed, a just proportion of the contract price, and of the expenses of said commission, and shall cause the same to be collected annually, and pay the stipulated compensation to said company; provided, if said company fail to keep any portion of said lands drained so as to be fit for occupancy and use, no tax shall be collected on such portion of said lands in the year or years when such failure shall happen.

The act provides for a collection of unpaid assessments by sale of the lands, which the company are allowed to purchase. It provides for locating the works of the company, and for obtaining the lands required for them by condemnation, declaring that, by payment of the sum awarded, the company shall become seized in fee.

The fourteenth section requires the company, in one year after the completion of the work, to declare a dividend to the stockholders of the net proceeds thereof, and to declare like dividends semi-annually thereafter. The capital authorized is one million of dollars, with power to borrow, on bond and mortgage, a like amount. No capital is required to be paid in. The incorporators are made the directors; and they continue such, until new ones shall be chosen in their places.

On the second day of June, 1866, Chief Justice Beasley, on application of the company, appointed Edward J. C. Atterbury, Henry W. Merrill, and Charles McIntosh, three of the defendants, commissioners of said lands, under the eighth section of said act.

Of this appointment no notice was given to the complain-

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ant, or the other land owners, except by advertisements, as provided in said act. The complainant, or his agents, did not know of it, and of course did not appear.

The commissioners gave public notice that they would meet at Jersey City, on the 17th of August, 1866, to consider and decide upon a contract with the company, and that the land owners might appear and would be heard. At this meeting, the complainant and other land owners appeared; a draft of the contract, proposed to be entered into by said commissioners with the company, was exhibited, also a map of the lands proposed to be drained, and showing the works by which the company proposed to accomplish the draining; and these included the lands of the complainant. The contract described particularly the location and dimensions of all the dykes, ditches, drains, and other works, proposed to be erected.

The amount of the compensation was in blank in the draft, which provided for the payment "in each year for all lands drained by said company, as provided in the aforesaid act, at the rate of ——— dollars per acre, per annum; and for lands which now are, or may hereafter be built upon, the additional sum of ——— dollars per annum, for each building occupying at least one hundred, and not exceeding one thousand square feet of land; and for each additional one thousand square feet of land, or fraction thereof occupied by any such building, the sum of ——— dollars per annum."

The commissioners, at the request of some land owners, postponed making the contract until the twenty-seventh of August, refusing to grant longer time to the applicants, on the ground that it was too late in the season; the commissioners had no knowledge of the cost and expense of constructing and maintaining such works, and had no funds to expend in discharging their duty.

None of the corporators own any land in the tracts proposed to be drained; none of the land owners applied for the act, or advocated it, but many of them who knew of it, opposed it strenuously. The bill was not signed by the Gov-

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error, but was returned by him to the senate, where it originated, with his objections thereto. On being re-considered by the senate, in due course, it was lost. On a subsequent day in the session, the vote by which it was lost was re-considered, and it received a majority of the votes of the senate, and being transmitted to the house of assembly, it was there re-considered and passed.

These are the facts as stated in the bill. On presenting this bill, duly verified, a preliminary injunction was granted, restraining the commissioners from making any contract.

The cause is now before the court on a motion to dissolve the injunction; no answer has been filed, or depositions taken. Therefore, the facts stated in the bill must, for the purposes of this motion, be taken as true.

The complainant places his right to relief on two grounds. First, that the giving over of these lands, to be drained and managed, to a company of private adventurers, who are to receive an annual sum, to be fixed by three commissioners appointed on their application, at the discretion of the commissioners, without being restricted to the cost of the improvement, or the benefit to the land owners, which sum is to be fixed as a rent charge on these lands forever, is a usurpation of power not granted to the legislature, and in contravention of constitutional restrictions.

Secondly, that the pretended statute under which the commissioners were appointed and claim to act, never became a law according to the requisites of the constitution of New Jersey; on the ground that the senate, having rejected the bill after it was returned to them by the Governor, had lost all further power over it, and it could only be brought up by being introduced anew, and going through the usual forms of legislation.

The provisions of this act are certainly extraordinary, and, so far as my observation goes, entirely unprecedented. But, if within the power of the legislature to enact, this can have no effect on their validity. The territory included within the purview of the act, and the dykes and ditches in the

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proposed contract, set out by complainant, is extensive ; it covers about one-fourth of the county of Hudson, and several thousand acres in the county of Union. The tracts lie miles apart ; their drainage is not connected. These lands belong to numerous owners, who are occupying and using them, some of whom may, at this time, be selling them or improving them in ignorance of this law, supposing that their title is unaffected by any encumbrance, rent-charge, or other right of strangers. This act proposes to give to ten strangers, who own no part among them, and against their will, an annual rent-charge or encumbrance forever upon their lands, the amount to be fixed by three commissioners appointed on application of the company. There are no qualifications required for the commissioners ; they need not be freeholders, or residents of the county or state ; they are not required to have any experience, skill, or knowledge of the matter of draining lands, or of the construction of works for that purpose, or of the cost of erecting, maintaining, or operating them ; they are not required to be sworn ; they are not required to be impartial. If one of the corporators should be appointed, a well established principle of administering justice would, no doubt, make that appointment void ; but if a son or brother of one of the corporators was appointed commissioner, or one attached by many other relations, which create a bias as strong and more dangerous, because less apparent, there would be no redress. Doubtless no judge would, knowingly, appoint such commissioner, but if appointed, it would not be contrary to the act, and there would be no relief.

These commissioners, so appointed, are to make the contract with the company. They are first to determine what works are to be constructed and maintained, and next, they are to fix an annual compensation therefor, to be specified in the contract. This annual sum they have power to fix, and no rule or limit is laid down in the act, by which it is to be fixed. It must be an annual sum ; it cannot, therefore, be the expenses of the improvements, nor need it be limited to the

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interest on the outlay, and the expenses of maintaining, repairing, and operating the works. The work was to be at the risk of the company; if, in any year, they fail to drain any part of the lands, such lands, for that year, are exempt from pay. Partial failures may be probable; they must be provided for; and the Tide Water Company, composed of strangers, without doubt, expect profits. The act provides for half yearly dividends. The whole scheme is got up, on the face of it, for the profit of the corporators; not only the absence of words restricting the compensation to the amount of costs and expenses, but the whole character of the act, as well as the draft of the contract to carry it out, shows that it was intended for the benefit and profit of the corporators, and not for the good of the public, or land owners. It would not be reasonable to expect them to undertake the work without a probable profit secured. The title to this act which, by the constitution, must express its object, is to incorporate the company, not to drain the salt marsh.

The commissioners, then, are not only at liberty to fix the annual compensation of the company above the amount of expenses incurred by them as profits, but the whole scope of the act would fairly indicate to them that such was their duty under it. It would be impossible for the most skillful engineer, or the most experienced contractor, to fix, by estimate, the cost of the original works to be erected in the course of the next year, with the uncertain and varying relation of prices and labor; and it is impossible to approximate to an annual sum that would just repay to the company the interest on the cost and the expenses of maintaining, repairing, and operating these works, and of managing and superintending them. Impartial commissioners would find it difficult to come near such a result, even if they were specially directed and sworn to aim at it. But the act permits them to exceed this, and commissioners who thought that the object of the act was what it indicates on its face, to give the corporators a profit out of the improvement and management of these lands, would give them such profits as their liberality or kindness might dictate.

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Whatever the value of this profit, beyond the actual cost, might be, is a charge gratuitously made by the legislature upon the property of the land owners. It is so much taken from the pocket of Coster and given to Schenck. It is so much of the property of one man given to another. I think there can be no mistake that this is the effect, as well as the object of this act. The proposed contract shows that the commissioners and corporators so understand it. The plan is to fix upon each acre of this large territory a permanent ground-rent, and to increase it as every house, shop, stable, or out-house, of ten feet square, is built; a matter that can have no reference to cost. These rent-charges, held by one in the property of another, are one of the most odious remnants of the old feudal lordships, and in New York the popular feeling against them has rendered it almost impossible to execute the laws in their favor.

The question, then, to be met is, whether the legislature can grant to Schenck a gratuitous rent-charge on Coster's land. The amount is of no consequence to this discussion. The commissioners may fix it at one dollar an acre above cost, in which case the grant is of thirty-nine hundred dollars a year; if they fix it at ten dollars, the grant is of thirty-nine thousand a year. If the legislature have the power to grant this gratuity, in connection with a bill for improvement, they have the same power to grant it without such improvements. If this can be done, there is much property in the state that will stand considerable charges of the same kind, which a willing legislature may make to their favorites, either nakedly, without any pretence of service, or joined, as in this case, with building, painting, fencing, ditching, or any one of the thousand ways in which one man would be willing to control and manage the property of another for a profit over the cost of the improvements and of superintendence.

It is now settled, beyond question, that, under a constitution like that of this state, the legislature cannot grant the property of one man to another, either with or without compensation. The only power it has is that called the power of

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eminent domain, vested, by necessity, in the sovereign legislative power of all governments. This is the power of taking private property for public use, whenever the necessities of the government require it. This power the constitution of this state, like that of the United States and most of the states, requires shall only be exercised upon making just compensation. The condition of compensation has generally been held annexed to the right of taking private property for public use under the most arbitrary governments, in which the powers of the sovereign are not trammelled by any positive constitutional restrictions. *Sinnickson v. Johnson*, 2 Harr. 129.

There is no prohibition in the constitution of this state, or in any of the state constitutions, that I know of, against taking private property for private use. But the power is no where granted to the legislature. The constitution vests in the senate and general assembly the legislative, or law making power. They can make laws, the rules prescribed to govern our civil conduct. They are not sovereign in all things; the executive and judicial power is not vested in them. Taking the property of one man and giving it to another, is not making a law or rule of action; it is not legislation, it is simply robbery. This power was not necessary or useful to be given to the legislature for any of the purposes for which the government was instituted; and it was not given. It is the principle of all free governments, that no right of the citizen should be surrendered to the sovereign, that is not necessary for the purposes of government. This maxim pervades all republican governments as well as monarchies; for the tyranny of a majority, or of corrupt representatives, is just as oppressive, and far more odious, than that of a monarch. This is the aim of all our constitutional restrictions. The first declaration in the bill of rights, that forms the first article of our state constitution, affirms, that one of the unalienable rights of every man is that of acquiring, possessing, and protecting property; and the last declaration therein says that such enumeration of rights shall not be construed to deny others retained by the people. This

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shows that the right of private property was made sacred by the constitution, to be invaded by no one, not even the legislative power, except where such control was expressly given by that instrument. Again, the sixteenth declaration of the bill of rights, which declares that private property shall not be taken for public use without just compensation; and the ninth provision of the seventh section of the fourth article of the constitution, the article defining and restricting legislative power, which declares that individuals and private corporations shall not be authorized to take private property for public use without compensation first made to the owners; both show, by inevitable implication, that it was not intended to confer on the legislature the power of taking private property for private use at all. And on this point the authorities and decisions, of which there are not a few, are uniform, without an exception.

Kent, in *Vol. 2, p. 339* of his Commentaries, says: "The right of eminent domain, or inherent sovereign power, gives to the legislature the control of private property for public uses, and *public uses only*; and on page 340, "but if they should take it for a purpose not of a public nature, as, if the legislature should take the property of A and give it to B, or if they should vacate a grant of property or of a franchise, under the *pretext* of some public use or service, such cases would be gross abuses of their discretion, and fraudulent attacks on private right, and the law would be clearly unconstitutional and void." The same view is taken by other authors. *Smith on Statutes*, § 136-7; *Sedgwick on Statutes* 514; *Angell on Highways*, § 86-7. And it will be found to be sustained by numerous decisions of courts and judges of the greatest weight and authority. *Wilkinson v. Leland*, 2 *Peters* 653; *West River Bridge v. Dix*, 6 *How.* 545; *Scudder v. Delaware Falls Co.*, *Saxt.* 726; *Sinnickson v. Johnson*, 2 *Harr.* 129; *Beekman v. Sar. & Sch. R. R. Co.*, 3 *Paige* 73; *Varick v. Smith*, 5 *Paige* 159; *In re Albany street*, 11 *Wend.* 149; *Bloodgood v. Mohawk & Hud. R. R. Co.*, 18 *Wend.* 56; *In re John & Cherry streets*, 19 *Wend.* 676; *Taylor v. Porter*, 4 *Hill* 140;

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Harris v. Thompson, 9 Barb. 361; *Embury v. Conner*, 3 Comst. 511; *Hepburn's case*, 3 Bland 98; *Bowman v. Middleton*, 1 Bay 252; *Pittsburgh v. Scott*, 1 Barr 309; *Cooper v. Williams*, 4 Ohio 253; *McArthur v. Kelly*, 5 Ohio 139; *Buckingham v. Smith*, 10 Ohio 288.

In the case of *Wilkinson v. Leland*, a statute of Rhode Island, which had no written constitution, transferred title to lands. Story, J., says that "the doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizens to the free enjoyment of their property." "We know of no case in which a legislative act to transfer the property of A to B, without his consent, has ever been held a constitutional exercise of legislative power in any state in the Union."

In *Saxt.* 726, Chancellor Vroom says: "It is admitted that private property shall not be taken for private use. The legislature has no right to take the property of one man and give it to another, even upon compensation being made."

In *matter of Albany street*, Savage, C. J., says: "The constitution, by authorizing the appropriation of private property to public use, impliedly declares that, for any other use, private property shall not be taken from one and applied to the private use of another. It is in violation of a natural right, and if it is not in violation of the letter of the constitution, it is of its spirit, and cannot be supported." In 4 *Hill* 144, Bronson, J., founds his reasoning upon the fact that the right to transfer private property for private purposes, is not part or parcel of the legislative power which is conferred by the constitution.

If this is a sound exposition of the powers of the legislature, and they cannot grant or take private property for private purposes, it is clear that they cannot grant an interest in, or charge upon, or rent issuing out of, such property, to private persons, for their own profit. The compensation, beyond the actual cost of making and maintaining the drainage, which the commissioners may provide for the benefit of the corporators by their contract, which, as it is

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shown, the act contemplates they shall provide, and which the proposed contract is evidently designed to secure, will be a charge on this property ; and this excess is the grant of a profit not intended for public use, but for private benefit, and is a burthen and wrong that is beyond the power of the legislature to impose or inflict.

This view of the case might render it unnecessary to consider whether the purpose or object to be effected by this company is a public purpose, in such sense as that property taken by them to accomplish their purpose could be said to be taken for public use. That inquiry would be necessary if the only question in the cause was the right of the company to take, upon compensation, lands needed for their works. That question is raised in the case, but the more important one is the power of the commissioners by their contract to impose, at their discretion, a charge upon these lands, without being limited to the cost of the work, or even the benefit to these lands. That is not taking the lands ; they are not to be used for a public purpose.

But as the question arises in the case, and has been brought before the court, it perhaps should be met here. Whatever may be the recitals in the preamble, it is clear from the provisions of the act, that the object and effect of it, if carried out, will be to improve these meadows, which are private property, for the benefit and use of the owners. The public cannot use the meadows, or the dykes, ditches, drains, culverts, pumps, or machinery, for any purpose ; any stranger walking upon them, pasturing his horse, or cutting grass there, would be a trespasser ; no right is granted to any of the public. When lands are taken for a railroad, canal, turnpike, ferry, or bridge, they are for public travel and use, and the public have *the right* to go upon them and use them for the object of their construction. The number of the private owners benefited do not make them the public ; the principle is the same if the number is three hundred, as if it is only three. A private road in New Jersey may be traveled by any one who has occasion to use it ; there may be only

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one, or three, or there may be three hundred, who will use it, but the right of the public to use it, makes it for public use. It is different from a right of way, which is private property, and confers no right except upon the owner. And therefore it is rightly held, that land in New Jersey may be taken for a private road, upon compensation. In New York, a private road was made by statute, a private right of way only for the applicant, not to be used even by the owner of the land over which it was laid, and therefore it was held, under their former constitution, that land could not be taken for it even upon compensation. *Taylor v. Porter*, 4 *Hill* 140. Their constitution of 1846, provided for this specifically.

It has been contended that the legislature, as they are the judges of the expediency of exercising the right of eminent domain for public purposes, are also the sole judges of what are public purposes, and that, as they have declared in the preamble of this act, that this will be a *public work*, the courts cannot review and consider it. If this were so, the restrictions of the constitution would be of little avail; the legislature, who determined to exceed their power to gratify some favorite, only need to recite that it would be a great public benefit to have L's hotel transferred to S, and they could make the grant.

This position is thought to be supported by the language of Chancellor Walworth, in *Beekman v. Sar. & Sch. R. R.*, 3 *Paige* 73, and in *Varick v. Smith*, 5 *Paige* 160. But a careful consideration of his language will show that he only intends to say, that the legislature must determine, in each particular case, the expediency of exercising the power of eminent domain for making *public improvements*.

In *Varick's* case, such is his language; and in *Beekman's* case, while his language *may* admit of the wider construction, yet the reference to 2 *Kent* 340, above cited, which expressly says that a grant of private property under *pretext* of public use would be void, shows in what sense he intended to be understood; above all, his clear demonstration in the subsequent part of his opinion, showing that the railroad was for

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the use of the public, although they could not use their own vehicles on it, and *therefore* that the land of Beekman was taken for public use in the sense of the constitution, settles what was his meaning.

But the clear and decided weight of authority is with Chancellor Kent, that the mere grant, or recital that it is for a public purpose, by the legislature, will not take from the courts the power of inquiring whether the object is a public use.

In the case cited from *Saxt.* 727, the point was expressly raised, and Chancellor Vroom, in conclusion, says: "Not doubting that the court can safely sit in judgment on this matter, it only remains to inquire whether the use to which the property is to be appropriated is a public use."

Wilde, J., in *Austin v. Murray*, 16 *Pick.* 126; Tracy, Senator, in *Bloodgood v. M. & H. R. R. Co.*, 18 *Wend.* 62; McLean, J., in the *West River Bridge case*, 6 *How.* 537; and Hand, J., in *Harris v. Thompson*, 9 *Barb.* 362, and again, in *Woodruff v. Fisher*, 17 *Barb.* 231, maintain that the courts must examine and decide whether the use is a public use.

The public use required, need not be the use or benefit of the whole public or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality; but the use and benefit must be in common, not to particular individuals or estates.

But there is another branch of legislative power that may be appealed to, as authorizing the taking of the lands required for the works to drain these meadows. It is the power of the government to prescribe public regulations for the better and more economical management of property of persons whose property adjoins, or which, from some other reason, can be better managed and improved by some joint operation, such as the power of regulating the building of party walls; making and maintaining partition fences and ditches; constructing ditches and sewers for the draining of uplands or marshes, which can more advantageously be drained by a common sewer or ditch. This is a well known legislative

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power, recognized and treated of by all jurisconsults and writers upon law through the civilized world; a branch of legislative power exercised by this state before and since the Revolution, and before and since the adoption of the present constitution, and repeatedly recognized by our courts. The legislature has power to regulate these subjects, either by general law, or by particular laws for certain localities or particular and defined tracts of land. When the constitution vested the legislative power in the senate and general assembly, it conferred the power to make these public regulations as a well understood part of that legislative power.

But this is a power to be exercised for the benefit of the parties affected, not for that of strangers. If the building and maintenance of party walls was authorized and regulated, it was to be done by the adjoining lot owners, or one of them, not upon the application of some enterprising or favored mechanics for the right to build party walls between all the lots in a certain town, at a goodly profit, and this, whether the owners wanted party walls or not.

Many private acts have been passed in this state for the draining of meadows, allowing commissioners appointed by the legislature, or, as they are in this case, to lay out the ditches and drains, and to assess and collect the expense of the drainage, including the compensation of the commissioners, out of the lands drained. I have been referred to, and examined hundreds of such acts, in this state and the state of New York.

Among others, is the act to drain the Riser in Bergen county, approved March 7th, 1850, (*Pamph. Laws* 292); which act was, by Chancellor Williamson, in the suit of *Berdan v. The Riser Drainage Company*, held to be constitutional, and an injunction refused.

But all these acts are understood to have been passed by the legislature, upon the application of some of the owners of the land affected by them, generally a majority, and always passed only for their benefit. Whether it is necessary to the validity of such an act, that it should be passed on the

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application of the owners, or some of them, I do not now mean to decide. It seems that to make a police regulation for the benefit of several adjoining owners, such, in the true sense of the phrase, it ought to be invoked or put in motion by the parties to be benefited, or some of them, and not by strangers who expect to profit by the execution of it; as a public war should be declared for the benefit of the country, and not of the hangers-on and retainers of the army engaged in it.

But there is another peculiarity in all these police laws that is of their very nature and essence; which is, that they assess on the persons or property benefited, only the expense of executing the improvement. The object of passing them, and the only reason of the existence of this power in the legislature is, that parties may be enabled, by making the improvement in common, to save useless expense, or that one person may be allowed to do something necessary to the use of his property, by using his neighbor's land in a way beneficial to both. A profit carved out for strangers is inconsistent with this.

I find no case reported, and among the number of acts examined I do not find a single one, where any burthen is imposed upon the lands drained, except the actual expense of drainage. The principle of them all is, to make an improvement common to all concerned, at the common expense of all. And to effect this object, the acts provide that the works to effect the drainage may be located on any part of the lands drained, paying the owner of the land thus occupied, compensation for the damage by such use. So far private property is taken by them; farther it is not. In none of them is the owner divested of his fee, and in most there is no corporation in which it could be vested, and for all other purposes the title of the land remained in the owner. To effect such common drainage, power was in some cases given to continue these drains through adjacent lands not drained, upon compensation. All this was an ancient and well known exercise of legislative power, and may well be considered as in-

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cluded in the grant of legislative power in the constitution. Beyond this, the limit above laid down must prevail, and we must hold that private property cannot be taken for private uses, even with compensation. Whether the power to divest the owner of his fee, contained in this act, which is not necessary or even useful for the purpose of drainage, would, in an act otherwise within the scope of legislative power, be valid, need not now be discussed.

The act under consideration does not fall within the principles on which these laws regulating the use and enjoyment of property, known as *police* laws, are based. While it provides for the drainage of lands, it is not enacted at the request, or for the benefit, of the land-holders, but that the company may make a profit out of the scheme. And were not this object specially provided for, so as to appear from the whole act to be the main end in view; if the act did not limit all charges to actual expenses, but permitted more to be levied and charged, in such manner that the courts could not control the excess; I should hold it void.

An injunction would not now be granted or continued, to restrain making the contract, because the power granted to take the fee of lands, instead of the use of them so far as necessary, is excessive and invalid. That question would arise only when the company offered to take or condemn the lands. But this contract will throw a cloud upon the title of every acre of marsh within the bounds of the proposed works. If this contract is made, and is valid and constitutional, every acre will be encumbered with a ground-rent, that may be varied and increased so as to make the fee worthless, and the land unsalable. The owners are not bound to wait for years the result of an ejectment brought for lands sold for non-payment of those assessments; but if the proceedings are illegal, unconstitutional, and void, by the established doctrine of this court they are entitled to have this cloud removed from their title. And when that cloud is placed upon it by an act of the legislature, which, until declared void by the proper tribunals, is

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presumed to be valid, there is the strongest reason for this court exercising its jurisdiction.

For the reasons above stated, I am of opinion that the grant of power in this act to the commissioners to make a contract with the company to bind the property of the landholders, is beyond the authority of the legislature, and void. This conclusion relieves me from considering the second question, whether this act ever became a law.

The motion to dissolve the injunction must be denied.*

GLASBY and others vs. MORRIS and others.

1. The owner of lands abutting on a public street, is presumed to own the land in front to the middle of the street, subject to the easement of the public highway.

2. The municipal government of the city of Elizabeth had not, until 1863, the power to construct drains or sewers under the public streets. It was charged with keeping them in repair, and no one could, without its permission, open or disturb the surface of the streets in front of the land of another.

3. A permit to open a street for the purpose of laying a drain, is not to be construed as a grant of a right to lay and continue a drain, but simply as what it imports to be, a license to disturb the surface of the street.

4. The person laying a drain by such permit, has no right to maintain it as against the owner of the land on that side of the middle of the street on which the drain is.

This cause was brought on for final hearing, upon bill, answer, and proofs.

Mr. F. B. Chetwood, for complainants.

Mr. R. S. Green, for defendants.

* Decree affirmed, *post* p. 518.

Glasby v. Morris.

THE CHANCELLOR.

The defendant, Justus Morris, is the owner of a house and lot on the east side of Broad street, in the city of Elizabeth.

The municipal government have recently constructed a public sewer in Broad street, running in front of Morris' lot, on the west side of the middle line of the street, and granted to Morris permission to connect his lot with it, by a proper drain pipe.

Morris, with the other two defendants, whom he employed to aid him in laying down his drain pipe to connect his lot with the public sewer, cut through and partially destroyed a drain that had been constructed by the complainants, or some of them, in the year 1852. This drain was in Broad street, several feet below the surface, and was laid in front of the lot of Morris, some distance easterly of the middle line of the street; and it was here, on the part of the street in front of his lot, on the adjoining half of the street, that the drain claimed by the complainants was injured.

The first point to be established by the complainants, to entitle them to any redress is, that they, or some of them, had a right, as against Morris, to maintain a drain in the public street in front of his lot. It is a well established principle, that the owner of land bounded on a street or highway, is presumed to own the soil in front of his lot to the middle of the street, subject to the easement of the public highway.

In this case, nothing appears to rebut this presumption in favor of Morris, either in the pleadings or evidence. For this suit, then, he must be considered the owner of the adjacent half of the street.

The complainants claim a right to maintain this sewer here, on the ground that it was constructed by them in March, 1852, by the permission of the municipal government of the city, then the borough, of Elizabeth, alleging that it then had the control of the streets, and power to au-

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thorize them to be opened, and to authorize the construction of drains and sewers therein.

The defendants deny the power of the municipal government, at that time, to construct sewers in the streets, or to authorize any one to construct them; and also deny that they authorized the complainants to construct this drain.

I do not find, in any charter of the borough of Elizabeth, or any act relating thereto, prior to the act of 1863—the present city charter—a grant giving power to the mayor, aldermen, and commonalty, to construct sewers, or to authorize any one else to construct them.

The act of March 4th, 1847, gave power to compel the owners to flag, pave, curb, gutter, and improve the streets, and this is a strong argument that the power did not, before then, exist. If that did not, the more extensive power of building sewers most probably did not; but it is a power no municipal corporation can have but by grant of the sovereign, and such grant nowhere appears.

The act of 1847, with the general powers of the old charter, gave it control of the highways, and made it, to a certain extent, responsible for their repairs. No one could disturb the surface of the streets without consent of the municipal authority. Such permission would justify the opening as against the public, but it would not, as against the owner of the soil, when it was done for matters not connected with the repair or improvement of the highway.

The permission granted by the mayor, aldermen, and commonalty, as given in evidence, shows that such was their understanding of their powers, and the extent of the right conceded. It is a permission “to open Broad street for the purpose of laying a drain.” All they got was permission to open the street; even if the municipality had the power to grant the right to build a sewer, it was not granted.

The drain of the complainants was, therefore, laid without any lawful authority as against Morris or those under whom he claims; they were trespassers, and have acquired no rights in his land that this court can protect.

The bill must be dismissed with costs.

Titus v. Phillips.

TITUS vs. PHILLIPS.

1. A verdict for the defendant, in a suit at law brought against him by the complainant, for the price of a farm conveyed to him by the complainant, is conclusive proof in this court, that the defendant did not agree to pay that price, or any part of it, for the farm.

2. If a complainant, who alleges that a deed was delivered without his authority and contrary to his instructions, afterwards, with full knowledge that his instructions had been disobeyed by his agent, brings a suit at law for the price, and prosecutes it to final decision, this is an affirmation of the delivery by which he is bound; and he cannot afterwards maintain a suit in this court to set aside the delivery of the deed, on the ground that he was mistaken in another matter, the amount which the defendant had agreed to pay for the farm.

Mr. B. Van Syckel, for complainant.

The complainant filed this bill to compel the defendant to reconvey to him, a farm of one hundred and fifty-four acres of land, in the county of Mercer.

The complainant's claim to relief rests upon three distinct grounds, either of which will entitle him to the interference of a court of equity.

1. The complainant intended and understood that he was to receive from the defendant, for the property, the same price he had allowed to Andrew R. Titus for it, and he did not intend to part with his title, unless he received that equivalent.

2. The deed from the complainant was never legally delivered to the defendant.

A deed, to be valid, must go into the hands of the grantees with the consent of the grantors.

A sealed instrument, entrusted to a party with authority to deliver it to the grantee in case certain conditions are complied with, will not become a deed if delivered without compliance with such conditions. *Black v. Shreve*, 2 *Beas.* 455.

3. If the contract was originally, as the defendant claims

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it was, viz. that the defendant should have the property for the encumbrances on it, the contract being by parol, the complainant had a right to change his mind, and did change it, and sent a due-bill for \$2510 to be signed by defendant before the delivery of the deed.

The defendant had no right to retain the deed without signing and returning the due-bill to the complainant.

Prior to the filing of the bill in this case, the complainant instituted a suit in the Mercer Circuit Court, to recover from Phillips the sum of \$2510, as the price of the farm, in which suit there was a verdict for the defendant.

It is now insisted that the complainant had his choice, to disavow the delivery of the deed and apply to equity to have the deed surrendered, or to affirm the delivery and bring suit for the price, and that he has chosen to affirm the delivery; and that if he brought suit in the circuit under a mistake, that mistake was only as to the fact whether defendant promised to pay the sum demanded; he was under no mistake as to the fact that the deed was delivered contrary to his instructions.

But this reasoning is not sound. It is true that, although the deed was delivered contrary to his orders, the complainant could afterwards ratify the delivery.

Was the institution of the suit in the circuit an assent to the delivery?

The complainant brought that suit upon the implied *assumpsit* of the defendant to pay the \$2510. He said, by bringing that suit, if the defendant will pay me \$2510, he shall have my property.

The defendant came forward and testified, that he understood he was to have the farm for nothing, and consequently there being no express *assumpsit* to pay \$2510, the law could imply none, and the suit failed. And we are now told that our suit, in which we declared that the defendant might take our property for \$2510, shall be construed into a declaration that he shall have it for nothing.

The pretence set up by the defendant in the circuit suit,

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was a surprise to the complainant, and the inference now attempted to be drawn is untenable.

Mr. Kingman, for defendant.

THE CHANCELLOR.

The object of the bill of complaint in this case, is the reconveyance of a farm in Mercer county, conveyed by the complainant to the defendant, on the ground that the deed conveying the same was delivered without the authority, and contrary to the orders, of the complainant; the complainant offering to repay to the defendant the amount expended by him in improvements on the property, above the net income received from it since the conveyance.

The chief, if not the only controversy in the case is, whether the deed was delivered without the authority, and contrary to the orders, of the complainant. The farm, on the second day of February, 1861, belonged to Andrew R. Titus, who is the brother of the complainant, and the son-in-law of the defendant. A. R. Titus, who was a merchant in Trenton, at that time was much in debt, and embarrassed, and was largely indebted to the complainant, who was also liable, to some extent, as an accommodation endorser on his notes. The farm in question, which was subject to mortgages amounting, with the interest, to about eighty-eight hundred dollars, was, on the second day of February, 1861, conveyed by A. R. Titus and wife to the complainant, by deed dated and acknowledged on that day, and recorded on the sixth day of the month. The consideration recited in the deed was twelve thousand five hundred dollars. On the 28th day of March next ensuing, the complainant executed and acknowledged a deed to the defendant for the same property, dated on that day, in which the consideration recited was eleven thousand two hundred and seventy-seven dollars. This deed was handed by the complainant to A. R. Titus, to be delivered to the defendant, about the time of its date, and was by him delivered at that time; the complainant alleges that it was to be delivered only

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upon defendant's signing a note sent with the deed, for twenty-five hundred and ten dollars, which sum he insists was to be the consideration of the deed above the encumbrances; and that A. R. Titus delivered it, contrary to such instructions, without getting the note.

The complainant alleges that the consideration given by him to A. R. Titus for the farm, was twenty-five hundred and ten dollars, the amount due on three notes of A. R. Titus held by him, and a check of two hundred dollars of A. R. Titus held by F. Kingman, paid by complainant, over and above assuming eighty-eight hundred and seven dollars and fifty cents due on mortgages upon the farm; and that the defendant was to pay him for the property the amount that he had paid to A. R. Titus. And that the note sent with the deed to be given as the consideration, was to secure this sum above the encumbrances, which were assumed by the defendant.

The defendant contends that he agreed with the complainant to take a deed for the property, and that the only consideration was, that he should assume and pay the encumbrances; that the deed was delivered and accepted upon this understanding, and that A. R. Titus was authorized to deliver it, and did deliver it, without requiring that the note should be signed. Both parties admit, that after the delivery of the deed, the complainant requested the defendant to sign the note or to return the deed, and that the defendant offered to reconvey the property, if the complainant would refund the amount expended by him for improvements; which offer the complainant did not accept, believing that he could compel the defendant to pay the price he had agreed to pay, as alleged by the complainant.

The complainant brought an action for the consideration in the Mercer Circuit, in which the jury gave a verdict for the defendant. That verdict, it is not disputed, is conclusive evidence in this suit, that the defendant did not agree to pay anything above the amount of the encumbrances.

But the complainant correctly contends that it does not debar him from proving here, that he did not intend or agree to convey the farm for the encumbrances, or from proving that

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he instructed his agent not to deliver the deed without the note; and that he may show in this court, that even if he had once agreed to convey, without other consideration, he had subsequently changed his mind, and declined to deliver the deed without the payment of the sum demanded above the encumbrances.

These positions are admitted, and the real issues in the case are, whether the complainant did authorize the deed to be delivered, only in case the note should be signed; and whether he has not, by his subsequent conduct, sanctioned and confirmed the delivery.

The question, whether the agreement between the defendant and complainant was to pay twenty-five hundred and ten dollars above the encumbrances, is important in this suit, only so far as it gives probability to the insistment of the complainant that he required the note as a condition of the delivery. That question is settled against the complainant, not only by the verdict in the suit at law, but by the weight of evidence in this cause. The responsive answer of the defendant, and the evidence of the defendant and A. R. Titus, are against him. The discussion in Kingman's office, proved by Kingman, A. R. Titus, and the defendant, as to the consideration to be inserted in the deed, is inconsistent with that being the agreement. Exhibit 1, of which 16 is a copy, does not sustain the complainant; he is clearly mistaken as to the time at which, and the object for which, it was made. It could not have been made until after the personal property, valued at twelve hundred and twenty-three dollars, had been transferred to the defendant, which was, as all agree, some time after the deed to the complainant; nor could it have been made to determine the consideration in that deed. If made to fix the consideration in the deed to the defendant, it shows that such consideration was not made up by adding twenty-five hundred and ten dollars to the amount due on the mortgages, but was made up by deducting the valuation of the personal property from the sum of twelve thousand five hundred dollars, the original consideration arbitrarily fixed for both.

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And the weight of evidence is not only that the defendant did not agree to pay anything beyond the encumbrances, but that the complainant agreed to convey for the amount of the encumbrances; the answer and evidence of the defendant, and the evidence of A. R. Titus and Kingman, must outweigh the unsupported oath of the complainant.

If we assume it as established, that both parties had agreed that the conveyance should be for the amount of the encumbrances only, it will have great weight in the consideration of the testimony as to the instructions given by the complainant to A. R. Titus, about the delivery of the deed.

The allegation in the bill, as to the instructions to A. R. Titus, is in these words: "That your orator gave the said note to the said Andrew, together with the said deed, telling him to get the said Henry to sign the said due-bill, and to give him the said deed." In his testimony, the complainant says: "After I drew the note I gave it to Andrew, with the deed; I told him to get that executed by Mr. Phillips, and *then* he could leave him the deed." Although it is put in a much stronger form in his testimony than in the bill, yet if he had agreed to convey the premises for the encumbrances only, which is the assumption on which we are reasoning, and if he had been told by the defendant that *he* did not consider the premises worth more than the encumbrances, and would not give more for them, it seems strange that he should send a deed by the defendant's son-in-law, variant entirely and largely from his bargain, with the simple direction to get him to sign the due-bill, and *then* to deliver the deed. He would naturally have sent a message that he found his liabilities for Andrew were so great that he must have more for the farm; that he had changed his mind, and would not convey it upon the terms agreed; and he would have cautioned Andrew on no account to deliver the deed unless the note was signed. He would not have rested satisfied with sending a letter, on finding that the deed was delivered without the note, but must have concluded that it was retained with the idea of making him perform his first

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bargain. These facts, and his whole conduct, are inconsistent with the theory of the complainant's counsel, that he had changed his mind and demanded new terms as the condition of delivering the deed.

On the fact that he gave Andrew instructions not to deliver the deed unless the note was signed, the only direct evidence we have is that of the complainant himself, and Andrew R. Titus; and on this point their evidence is contradictory. I do not consider that the complainant is entitled to less credit than Andrew because he is a party to the suit; Andrew is swearing for his father-in-law, in endeavoring to save a remnant of his property for himself and family; his position is no better than that of the complainant.

The conduct of the complainant is not such as to give aid to his story. No man, with such a mistake, would have been so passive as he was, by his own account, if we believe that, contradicted as it is both by Andrew and Mr. Phillips. He would not have been satisfied with writing a letter, if it was not responded to at once. The contents or date of his first letter are not very clearly shown, but he would not, in his letter of the 23d of April, so mildly have asked for a return of the deed, or that the note be signed; it would not have been, "I would like you," a gentle expression of preference; he would have insisted on his right, and urged Andrew's mistake or bad faith in delivering the deed.

Besides, the burthen of the proof in this case is on the complainant; he has his own oath only, contradicted by Andrew directly, and by the defendant, in all the circumstances with which he endeavors to fortify it.

If this farm is worth eleven thousand three hundred dollars, great injustice has been done the complainant by the defendant; he has evidently paid for his brother, some two thousand dollars more than he has realized from his property. It was the intention of the complainant and Andrew that the complainant should be saved, whatever other creditors might be left out in the cold; and between them it was right that he should be protected. The defendant ought not to

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take from the complainant Andrew's property to keep for him, leaving his debt to complainant unpaid, unless by complainant's consent.

But this equity can have no influence on the decision in this case, except to support the evidence of the complainant and make it more probable. But from the whole evidence, taken together, it seems to me more probable that the complainant, in order to favor his brother and secure him a home, or in consideration of his assigning all his personal property to protect him, acceded to the defendant's terms; and that he intended to rely on his sense of justice, and on Andrew's influence, to get him to reimburse all that he should lose by Andrew; and that he sent the note, not to be signed as a condition of the delivery, but to try the experiment whether defendant could not be induced to sign it, so that in case of loss he might have in his own hands the means of reimbursement. It is clear that the note was intended not to be paid, except to make good any loss the complainant might sustain by his advances to, and endorsement for, Andrew.

Again, the complainant has assented to and confirmed the delivery by Andrew, by his suit at law. He knew that the deed was delivered contrary to his instructions. He had his choice, to disavow the delivery and apply to this court to have the deed delivered up, or to affirm the delivery, and bring suit for the price; he elected to affirm it, and has recognized it as his own delivery, and sued for the consideration, and he is not now at liberty to take the other course, having made and acted on his election. If he brought that suit under mistake, that mistake was only as to the fact whether defendant had promised to pay the sum demanded; he was under no mistake as to the alleged fact that the deed was delivered contrary to his instructions, and without authority.

I am of opinion that the complainant's bill should be dismissed with costs.*

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HUFFMAN vs. HUMMER.

1. A contract to convey lands bounded on the south by a line ten yards north of the quarries on them, the face of the quarries, as worked, being toward the south, must be held to mean lands bounded on the south by a line ten yards north of the face of the quarries, as worked, without regard to the extent toward the north, of the stone that constitutes the quarries.

2. When a line by which land is to be conveyed, is described as a line ten yards north of the face of quarries upon the tract, and that face is jagged, and at one extremity much to the north of the general line of the face, the line must be a straight line in every part, distant, at least, ten yards from the face of the quarry.

3. Although a written contract cannot, either at law or in equity, be waived or discharged by parol, yet, when one party, by a parol waiver or discharge, induces the other to enter into engagements inconsistent with its performance, the remedy by specific performance will be barred; but for that purpose the waiver must be explicit, and clearly proven.

4. When the defendant bound himself to convey on or before a certain day, and the complainant agreed to pay on the deed being executed, the complainant is not in laches in not tendering himself ready to pay, if the deed has not been executed or tendered.

5. A complainant asking specific performance, must have shown himself ready and eager to perform his part, and must be guilty of no laches in bringing suit; but a delay of six days in demanding a deed, or of fifteen days in bringing suit, will not be esteemed laches.

This cause was brought on for final hearing, upon bill, answer, and proofs.

Mr. Van Fleet, for complainant.

Equity can only be done by decreeing specific performance. The contract is already partly executed. The complainant has paid \$300 of the purchase money, and has been put in possession of the land, and has made improvements, for which he can recover no recompense if his prayer is denied.

Equity regards the complainant as the owner of the land, and the defendant as the owner of so much of the purchase money as is unpaid. 1 *Story's Eq. Jur.*, § 790.

Courts of equity will decree specific performance of a con-

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tract within the statute of frauds, when it has been in part performed ; and this is done upon the ground that otherwise one party would be able to practice a fraud upon the other. 1 *Story's Eq. Jur.*, § 759, and cases cited in notes 1, 2, 3, and 4.

The relief complainant asks is resisted on four grounds—

1. Laches of complainant. 2. Parol waiver of the contract. 3. Misconduct of complainant, in procuring an erroneous survey of the land to be made. 4. The agreement is so uncertain that it cannot be enforced.

1. Laches.

The great purpose of courts of equity, in taking jurisdiction of suits for specific performance, was to give relief in cases where the complainant had, by reason of the great strictness of courts of law, lost his right to an action for damages in consequence of some default.

Courts of equity frequently decree specific performance where the terms of the agreement have not been strictly performed by the party seeking relief, and he has thereby lost his right to sue at law. 1 *Sug. on Ven.*, ch. 4, sec. 3, par. 36, p. 277 ; 1 *Story's Eq. Jur.*, § 775 ; *Winne v. Reynolds*, 6 *Paige* 407 ; *Radcliffe v. Warrington*, 12 *Vesey* 326, (marg.) ; *Taylor v. Longworthy*, 14 *Peters* 173 ; *Perkins v. Wright*, 3 *Harris & M'Henry* 326 ; *Clitherall v. Ogilvie*, 1 *Dessauss*. 263 ; *Edwards v. Handley*, *Hard.* 102 ; *Voorhees v. De Meyer*, 2 *Barb. S. C. R.* 37 ; *Lewis v. Woods*, 4 *How. (Miss.)* 86 ; *Tevis v. Richardson*, 7 *Monroe* 656.

It is claimed that the complainant has not shown himself ready, desirous, prompt, and eager.

The contract required the defendant to deliver to the complainant a deed for the land, on or before April 1st, 1865. The defendant was to be the actor. The complainant waited for the defendant to fulfill his contract, until April 6th, and then demanded a deed, and tendered the balance of the purchase money. The land was sold by the acre, and the amount of the purchase money to be paid depended upon the

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quantity of land. That could only be ascertained by a survey. It was the defendant's duty to have the land surveyed.

Time, in equity, is never regarded as material, unless it is made so by the express terms of the contract. 1 *Story's Eq. Jur.*, § 776; *Hipwell v. Knight*, 1 *Younge & Coll.* 415; 1 *Sug. on Ven.* 356, note 1; *New Barbadoes Toll Bridge Co. v. Vreeland*, 3 *Green's C. R.* 157. In the case last referred to, the contract was made in 1816, bill filed in 1839, and performance decreed.

Time is not made material by this contract. The defendant is not in a position to charge the complainant with laches. From the time the contract was made—October 6th, 1864—up to the time the bill was filed—April 12th, 1865—he never took a step necessary to the fulfillment of this contract on his part.

2. Parol waiver.

It is conceded that a parol waiver of a contract under seal, is a good defence in equity; but it must be shown by very clear proof that there was a total abandonment of the whole agreement, and that the parties were placed in the same situation in which they stood before the agreement was entered into. 1 *Sug. on Ven.* 202, par. 7; *Ibid.* 204, par. 9; *King v. Morford*, *Saxt.* 274; *Stoutenburgh v. Tompkins*, 1 *Stockt.* 332; *Baldwin v. Salter*, 8 *Paige* 473.

The waiver set up is, that on the 15th of March, 1865, as the parties casually met at a vendue, they got into a dispute about the correctness of a survey the complainant had procured to be made of the lands agreed to be conveyed, and in that dispute the complainant said he would not take a deed for the lands, unless conveyed according to that survey; that the defendant then said he would not convey according to that survey; and thereupon the parties separated, the complainant saying, "we will settle this another time," and the defendant replying, "all right." At the time these words were uttered, neither party understood that the contract was abandoned.

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3. Misconduct of the complainant, in having an erroneous survey made.

If the survey was made with design to procure a conveyance of more land than the complainant purchased, it does not, in the slightest degree, abridge the complainant's rights in this case, and should not influence the judgment of the court one way or the other.

The defendant was not bound by it. If it was not satisfactory to him, he had a right to have another made. But the evidence shows it was made by the surveyor, with the agreement before him, as he thought, strictly in accordance with the agreement, and without any instruction or direction from the complainant. If an error was made in the survey, it was the error of the surveyor, and not of the complainant.

4. The agreement is so uncertain that it cannot be enforced.

The only respect in which it can be claimed that there is ambiguity, is in that part of it which relates to the location of the line along the lime quarry. The general direction of the face of the quarry is from east to west, until near its western boundary, and there its direction is northerly for about one chain. The language of the contract is, "the first lot is that part that come off the Stout farm, north of the lime quarry; *the line is to run ten paces north of said quarries.*"

There is no ambiguity. The contract requires but one line, and that that shall be a straight one. So much of the quarry as has been opened in a northerly direction, has been abandoned and unworked for over twenty years. It was not regarded as a quarry by the parties, at the time the contract was made. But if it should be held that this is a part of the quarry, there is no ambiguity. The face of the quarry is irregular, in some places extending much further south than in others. What is meant by the words, "the line is to run ten paces north of said quarries" is, not that it shall be exactly that distance north of each point of the quarry, but

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ten paces north of the general direction of the quarry. There will be no difficulty in locating a line in that way.

Mr. Bird and *Mr. G. A. Allen*, for defendant.

THE CHANCELLOR.

This suit is for the specific performance of a contract to convey lands.

The contract was in writing, signed and sealed by both parties, dated October 6th, 1864, to convey the lands on or before the first day of April then next; part of the consideration was paid, and the complainant put in possession of the premises; he had made improvements, and cut wood and timber, and done other acts of ownership. The price to be paid was one hundred dollars per acre. One of the two tracts is stated to be, "that part that came off the Stout farm, north of the lime quarries; the line is to run ten paces north of said quarries; to all the land between the mill road and Euphemia Philhower's land on the west, and her line on the north, supposed to be about eighteen acres." The boundaries on the north and east and west, are certain and definite. The lime quarries on the south are part of the tract which the defendant reserved, and a dispute arose between the parties about the location of the line described in the agreement, "to run ten paces north of said quarries."

In February or March, 1865, the complainant had this line run by a surveyor, in the absence of the defendant, who was sent for, but being absent from home, did not receive notice of the survey. The defendant, when he learned the location of the line, disapproved of it as different from the line in the contract, and meeting the complainant on the 15th of March, in a conversation about the matter, told him that the line was not according to the contract; the complainant insisted that it was, and that he would require a conveyance according to that line; and, according to some of the testimony, said that he would not take it in any other way; but he said to the defendant, on leaving, "we will settle this some other time." The defendant made no survey or computation of the quantity

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of land, nor prepared or executed any deed on or before the first of April; the property was encumbered by a mortgage and a judgment, which were unpaid. The agreement required the complainant to pay the price "on executing of the said conveyance." Neither party tendered himself ready to perform the agreement on or before the first of April. On the third of April, the defendant agreed to convey the premises to Euphemia Philhower, who paid him four hundred dollars on account, for which he took her note. She knew, at the time, of the contract with the complainant. On the sixth of April, the complainant, having heard of the sale to Mrs. Philhower, sent his son-in-law to the defendant, and notified him that he was ready, and had been for some weeks ready, to receive and pay for the property, and requested him to convey it. The defendant answered that the conveyance was not ready, and would not be ready; that he had sold the land to Mrs. Philhower. The complainant, without further demand or tender, filed the bill in this cause, having first purchased the mortgage on the property, which was assigned to him.

The difference about the south line arose from the fact that the face of the quarries mentioned in the agreement, and which had been worked from the south, run in a direction generally from east to west, or nearly so, from Mrs. Philhower's line on the east, until within about one chain of the western boundary or mill road; here they had been worked to some extent for more than a chain north of the general direction of the face of the quarry. The line run by the complainant's surveyor was ten yards north of the general direction of the face of the quarry, disregarding this part at the west side, and it run through this part, leaving a large portion of it north of the line. The defendant insisted that the agreement, by its true construction, calls for a line running ten yards north of all the quarries.

The defendant resists the claim for specific performance on these grounds:

1. That the agreement applied to the premises, is ambiguous and uncertain.

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2. That, if his construction of it is correct, the complainant, by the notice given in March, that he would not perform it except as he construed it, discharged the agreement.

3. That complainant was guilty of laches in not tendering the money and demanding a deed on the first day of April.

1. As to the ambiguity. I have no doubt that the word quarries, here means the face of the quarries; it is the usual meaning of the word as applied to quarries opened and worked, and the other parts of this contract show that the word was used here in that sense. It is more difficult to determine what is meant by "a line to run ten paces north of the quarries," when the face of the quarries is not only jagged and irregular in the part having a general direction from east to west, but near its western terminus runs for three times ten paces north of the line of general direction. But the object of these words in locating that line, was to reserve to Hummer all his lime quarries, and ten paces north of the face as then quarried, for future use. This cannot be effected by adopting a line that will pass south of the face of any part.

The language, "the line," in such connection, means a straight line, one line, and not many lines. In this case, a line drawn from a point ten paces north of that part of the face of the quarry near the mill road, which extends the furthest north, to a point ten paces north of the face of the quarry, at its eastern extremity, near Mrs. Philhower's line, will answer both the language and the object of this description; it is the only line that will, and therefore is the line required by the agreement. I am, therefore, of opinion that this contract is not void for uncertainty.

2. Although this construction is not the one put upon the contract by the complainant in his interview with the defendant, on the 15th of March, I do not think that he is barred of his remedy in this suit, by what was then said. A written contract, especially one required by statute to be in writing,

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cannot be waived or discharged by parol, at law, nor, in general, in equity. But in equity, this case is one of the exceptions to that rule. When the complainant has, by parol, waived or discharged a contract, and the defendant, by such action, has entered into obligations inconsistent with its performance, it is an equity that will bar the remedy by specific performance. *Fry on Spec. Perf.*, § 693; *King v. Morford*, Saxt. 274; *Stoutenburgh v. Tompkins*, 1 Stockt. 332; *Stevens v. Cooper*, 1 Johns. C. R. 429.; *Baldwin v. Salter*, 8 Paige 473; *Backhouse v. Mohun et al.*, 3 Swanst. 434, note.

But such parol waiver or discharge must be clear and explicit, and proved beyond doubt. In this case, the conversation on March 15th, relied upon as a waiver of the contract, was not intended as such, and cannot be so construed. The complainant insisted on his construction, felt certain and positive that he was right, and avowed his intention to adhere to it, and not to perform the contract otherwise. Taken by itself, it was no discharge or waiver; but when accompanied by the words which the defendant himself testified were used by the complainant at parting, "we will settle this some other time," it is very clear that it was not intended as a discharge of the contract, and was not received as such. Few contracts would stand in this court, if such an insistment in the negotiations about their execution should be held to discharge them. *Fry on Spec. Perf.*, § 698.

3. The laches in this case is not such as will defeat the remedy. It may be well doubted if there was any laches at all. The defendant bound himself to convey, on or before the first day of April, the complainant to pay, on the deed being executed; until the deed was properly executed, he was not bound to pay, or to offer to pay. He was then not in default at law on his contract. But equity requires that a complainant, seeking for specific performance, should have shown himself ready, anxious, and eager to perform his part; but in this case there was no laches of the complainant.

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Any further tender of the money, or readiness to perform, was dispensed with by the answer given by the defendant to the complainant's agent, on the sixth of April; he said he would not convey the land, and had sold it to another.

There was no laches in bringing suit; the bill was filed in fifteen days, not more than the time proper to be taken by careful counsel in preparing a bill in such cases.

There must be a decree for specific performance, and a reference to a master to ascertain and settle the boundaries, the quantity of the land, and the amount to be paid above the sum already paid, and the encumbrances.

THE FREEHOLDERS OF MONMOUTH COUNTY *vs.* THE RED
BANK AND HOLMDEL TURNPIKE COMPANY.

1. The title to the public bridges constructed by a county, is vested in the board of chosen freeholders of that county. It is a corporation created for the purpose of representing the county and holding its property, and suits for the protection of such property are properly brought in the name of that corporation.

2. The bridges belonging to a county are public property, held for public use, and are not within the protection of the constitutional provision which forbids private property to be taken for public use without compensation. The legislature have power to direct in what manner such bridges shall be appropriated to public use; and may authorize them to be taken by a turnpike company for part of its road, without compensation.

3. Where the charter of a turnpike company authorizes it to construct a road on a route which includes a public county bridge, and requires it to pay to the owners of lands over which the road should pass, all damages sustained, the compensation clause applies to such bridge, which is included in the term *land*, and of which the county is the owner.

4. Even if the damages by taking the county bridge would be only nominal, the county is entitled to restrain the turnpike company from using it as part of their road, until the damages are assessed and the title of the bridge vested in the company, so that the county may be relieved from the obligation to repair it.

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5. Where a turnpike company is entitled to take toll on two continuous routes of their road when finished, and a county bridge not purchased or acquired, forms part of such two continuous routes, the taking tolls on that section will be restrained until the bridge is acquired.

The bill in this case was exhibited for an injunction to restrain the defendants from using, as part of their turnpike, a bridge constructed by the complainants over the Shrewsbury river, and from charging toll for traveling thereon.

The bridge in question was built by the complainants, by authority of the legislature, in the year 1862, and was part of the public road leading from Red Bank to Holmdel. The defendants were incorporated March 24th, 1864, with power to construct a turnpike road on and along the public highway from Red Bank to Holmdel, being required to pay the owners of the lands over which said highway then passed, all damages occasioned by the construction of the turnpike road, limiting the title to be acquired in the land, to the right of way only.

The act authorized them to take toll at certain rates per mile when the road was finished, and to place four gates thereon; and when any two consecutive miles were finished, to erect a gate and take toll therefor. The company were required to make bridges along the line of their road, not less than twenty feet in width. The bridge of the complainants was eighteen feet wide, and over seven hundred feet long. The defendants finished two consecutive miles of their road, from its beginning at Red Bank, in 1865, and set up a gate there, and began, and have continued, to take tolls for that part. The bridge of the complainants was part of the first mile of their road, and was a part on which they charged and received tolls.

A supplement, approved February 8th, 1866, enacts that this bridge shall be deemed of sufficient width for the requirements of the charter. This supplement also increases the rates of toll.

The defendants have never had the value of the bridge, or

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the damages by taking the same, assessed, and have not obtained the consent of the complainants to use the bridge; but the complainants, on the contrary, have forbidden the use of it.

Mr. J. Parker, for complainants.

Mr. R. Allen, jun., and *Mr. H. S. Little*, for defendants.

THE CHANCELLOR.

The bridge in question belonged to the complainants; they are trustees for the county, and incorporated to represent it; the legal title to all property belonging to the county, is vested in them. This is clearly the object and effect of the act incorporating them. *R. S.* 182; *Nix. Dig.*109*. By the forty-first section of that act they have full power to sell and convey all such property. It is their duty to protect it, and to bring suit for that purpose. If relief can be had in this case, they are the proper parties to seek it.

The charter of the defendants (*Acts of 1864, p. 398, § 11*), requires them to construct their road over this bridge; they were, by that provision, clearly entitled to take it. And had the legislation ended here, it would, as seems to me, have authorized them to occupy it without compensation. This bridge belonged to the complainants as trustees for the county. It was held by the public, and for public use. It was not, therefore, within the letter or meaning of either of the provisions of the constitution of the state, which prohibit *private* property from being taken for public use. The property of a municipal corporation, not held for public use, might be protected; but not property like this, when taken for the use to which it was dedicated. The legislature could have authorized the defendants to take the public road, including the easement or right of way which the public had acquired over lands of individuals, without further compensation to the owners of the fee. This was held by the Supreme Court, in the case of *Wright v. Carter*, 3 *Dutcher* 76,

* *Rev.*, p. 127.

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and it is understood that this part of the opinion of the Supreme Court was approved by the Court of Errors, although their judgment, as to the right to erect a toll-house, was reversed.

But the legislature did not choose to exercise this prerogative in this case, but directed that the defendants should pay to the owners of lands over which the highway then passed, all damages sustained. Complainants owned this bridge, and a bridge, like a castle, is *land*; and for this purpose, that is, to make it land, it is immaterial whether complainants owned the fee of the land in the bed of the river on which it was erected, or only the easement of maintaining a bridge there; it is within this part of the provisions of the act, and the defendants are bound to pay the complainants their damages, or their road does not extend, and is not completed, over the bridge.

The damages may not be of any great amount. I should much incline to the opinion that nominal damages would be sufficient; the public have secured to them the use of the bridge, and the complainants are relieved from the duty of maintaining it. But of this question, I am not the judge. Yet, even if the compensation should be nominal, the complainants are entitled to be freed from the burthen of maintaining the bridge, which would else be upon them, and this is a sufficient substantial damage to entitle them to the interference of this court, if the case, in other respects, warrants it. If an assessment was made, the title to the bridge would not be vested in the defendants so as to enable them to sell or remove it, but only for the purpose of using, repairing, or re-building it, and they could be compelled to keep it in repair. And while they use it as part of their road, the county should be free from that burthen.

The first two continuous miles of the defendants' road were not completed, according to the provisions of the act, when they erected their toll-gate, and are not now completed. And although the complainants are not aggrieved by the taking of such toll, as they pay none, yet they are aggrieved

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by the use of their property to make up that two miles. And as they have no other efficient remedy to redress this wrong, it is a proper case for the interposition of this court by injunction.

I am of opinion that the complainants are entitled to an injunction, restraining the defendants from using their bridge as part of the turnpike road, and from taking tolls for traveling on the two miles of their road next the Red Bank terminus, and from maintaining a turnpike gate thereon.

PHILLIPS vs. REEDER AND PRIOR.*

1. If R. enters into a partnership with P. to continue for three years, and so much longer as R. should continue lessee of the stone quarries leased to him by M., and at the expiration of the lease, R. refuses to renew the lease with M., it having a covenant for renewal at his option, the partnership expires with the lease. R. was not bound to renew the lease and continue the partnership, if not expressly bound so to do by the partnership agreement.

2. If articles of partnership provide for its continuance during the existence of a lease, renewable at the option of one of the partners, it is at the option of such partner to continue the partnership by renewing the lease, or to end it by refusing to renew. He has a right to refuse to renew for the purpose of ending the partnership.

3. That a partner, having the option to renew such lease and continue the partnership, may have talked and acted as if he intended so to do, will not bind him to renew if he made no contract to do it.

4. Upon the dissolution of a partnership, in which the articles provided that the effects, on dissolution, were to be equally divided among the partners, the property and effects of the firm belong to the individuals who composed it, as tenants in common; part of the former members of the firm cannot dispose of the property of any other member, without his consent.

5. If some of the members of a dissolved partnership dispose of the property of one of the partners, without his consent, he may, at his option, call on them to account for its value.

6. In many cases, if some of the partners, after dissolution, continue the business with the property of the late firm, the retiring partner will be entitled to call on them for a share of the profits, as well as for his capital.

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7. But this principle will not be applied to a case where the chief contribution to the business was personal skill and labor, and a new partnership was formed with strangers, merely because some of the property of the retiring partner was used in the new business, after being sold to the new firm by the continuing partners, without authority so to sell it.

8. A majority of the partners of a firm that is dissolved, have no right, without judicial proceedings, to compel another partner to sell or divide the property, or to choose an appraiser for the purpose of valuation, or if he refuses, to choose appraisers themselves, and purchase or sell his share at such valuation. But if they have appropriated or sold the property, they must account to him for the real value of his share and interest therein.

Mr. Aitkin and Mr. J. Wilson, for complainant.

Mr. Richey, for defendants.

THE CHANCELLOR.

The complainant, Benjamin D. Phillips, entered into partnership with the defendants, Charles Reeder and Samuel Prior, by written articles, under the hands and seals of the parties, dated the 15th day of December, 1860. The partnership was to commence from the date, and to continue for three years, and so much longer as the defendants should continue lessees, under the lease then existing, of three stone quarries, leased to them by Cornelius V. Moore. That lease was dated October 30th, 1860, and was for the term of three years, from January 1st, 1861, with a right of renewal, at the option of the lessees, upon their having performed the covenants therein. The business of the partnership was to furnish stone for building, and to cut stone to order, and for sale. The lease from Moore was not renewed by the defendants, but they elected, before its expiration, to take a new lease from the heirs of Moore, he having died. This new lease was for only two of the three quarries, and was on terms materially different from the first lease.

The defendants insisted that the partnership expired by its own limitation, contained in the articles by which it was constituted. The three years had expired on December 15th,

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1863, and their term, under the Moore lease, ended January 1st, 1864; when they practically put an end to the partnership, and formed a new one, with Albert K. Reeder, the son of Charles Reeder, and Thomas H. Prior, the son of Samuel Prior, to carry on a like business.

The complainant insisted that the partnership was not ended on the first day of January, 1864; that it was a partnership for six years, or for the term for which the Moore lease could have been renewed; that this lease virtually belonged to the firm, and the defendants were bound to renew it for the benefit of the firm; that the taking a new lease for part was designed to evade their contract with him, was a fraud upon him, and that they must be considered to hold it in trust for the firm, and that the partnership therefore continued.

Under this insistment, on the first of January, 1864, he declined to enter into any negotiation with them for the division or sale of the partnership property. They had it appraised, gave him the inventory and appraisement, and offered to divide it by the appraisement, to let him take one third, and they retain two thirds. They offered that he might buy their two thirds at these prices, or that they would buy his third at the same. He, believing that he was entitled to continue in the partnership, refused to assent to any of these offers, and thereupon the defendants sold all the partnership stock, at the appraisement, to the new firm, having first given the complainant notice that they would do it.

The complainant, on the 20th day of February, 1864, filed his bill to have the partnership declared to be still in existence, and to compel the defendants to go on with him as a partner, and for an account of the property and profits of the firm made, and to be made; or, if the partnership should be held dissolved, for an account of the property and profits of the firm, including the profits on all contracts entered into before the dissolution, although executed afterwards.

The first question to be decided is, did the partnership terminate on the 1st of January, 1864? The term of three

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years had expired, and the lease from C. V. Moore terminated on that day. By the terms of the articles the partnership ended on that day. The complainant contends that the partnership was intended to extend over the whole term to which the Moore lease could be renewed; that the lease belonged to the firm, and it was the duty of the defendants to have renewed it for the term provided.

But this lease did not belong to the firm, either at law or equitably. The articles of partnership do not so provide, either expressly or by implication; on the contrary, they expressly provide that the defendants shall continue to work the quarries, and furnish the firm with all the stone quarried there at cost. The provision of the lease against assignment, and the aversion of Moore to Phillips, presented a bar to its belonging to the firm. The articles might have obliged the defendants to renew that lease. They do not so provide, and this court cannot add to them any additional provision, especially when the discussions between the parties about the term of the partnership, whether for six years or three years, must have suggested to them and their counsel the propriety of such a provision, if it had been intended. As the term of the partnership was made to depend upon the renewal of a lease, which the defendants could renew or not at their option, it must be construed to be for three years, and to be extended for three years longer, at the option of the defendants. If the defendants had refused to renew this lease expressly for the purpose of ending the partnership, to get rid of the complainant as a partner, and to take their own sons in his stead, they had the right to do it.

The fact that during any part or the whole of the partnership they may have expected to renew the lease and continue the partnership, and may have so said and acted, will not take away their right to exercise their choice, unless what they said or did amounted to a new contract with the complainant. There is no proof of anything like this. The partnership between the complainant and the defendants, must be held to have expired on the first day of January, 1864.

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By the articles, it was provided that the effects, on dissolution, were to be equally divided among the partners, one third to each. After that, the defendants had no right to, or power over, the complainant's one third. They were merely tenants in common; neither could set off or sell the share of the other, without his consent. The sale, therefore, made by the defendants to the new firm, is not valid as far as the interest of the complainant is concerned. In this suit there can be no recovery against the new firm, as they are not parties. But the defendants have undertaken to sell and dispose of the interest of the complainant, and, therefore, they may be held to account for it. They must account to him, not at a value fixed by themselves, or appraisers chosen by them, but at the real value, to be ascertained by evidence, on a reference to a master.

The complainant claims a right to his share of the profits made by the new firm, on the ground that the business was continued with the stock and capital of the old firm, and that his property was put to risk in making these profits.

There is a series of cases to sustain the principle, that where one or more of the partners of a firm continue the business, after the partnership has been dissolved by death or otherwise, the retiring partner, or the legal representatives of the deceased partner, are entitled to his share of the profits made after dissolution. 3 *Kent* 64; *Collyer on Part.*, § 324; *Story on Part.*, § 329, 342; *Lindley on Part.*, (93 *Law Lib.*) [830] to [837]; *Brown v. Litton*, 1 *P. W.* 140; *Hammond v. Douglas*, 5 *Ves.* 539; *Crawshay v. Collins*, 15 *Ves.* 218; *S. C.*, 1 *Jac. & W.* 267; *S. C.*, 2 *Russ.* 325; *Featherstonhaugh v. Fenwick*, 17 *Ves.* 298; *Brown v. De Tastet*, *Jacob* 284; *Wedderburn v. Wedderburn*, 2 *Keen* 722; *Palmer v. Mitchell*, 2 *M. & K.* 672; *Stockton v. Dawson*, 9 *Beav.* 239; *Featherstonhaugh v. Turner*, 25 *Beav.* 382; *Simpson v. Chapman*, 4 *De G., Mac. & G.* 154; *Stoughton v. Lynch*, 1 *Johns. C. R.* 467.

But the application of this principle could hardly be made

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in the present case; there are many limitations and qualifications to it, and it is always applied "with just allowances."

In a case like this, where the main contribution to the success of the firm by each partner, was his skill, time, and diligence, which each contracted to devote exclusively to the business, it would be difficult, if not impossible, to decide what allowance ought to be made for the skill and services of the two new partners, and what deduction for the want of the skill and services of the complainant. The later authorities limit the application of the rule.

Again, this doctrine of the equity courts was intended as a penalty, to hold to strict account, in the most severe manner, executors and others, who go on wantonly trading with the capital of others in no laches or fault. In this case, it would be a severe penalty to base an account on that principle. The defendants, in this case, made offers that the complainant ought to have accepted. They asked him to divide the property according to the agreement in the articles; this division it was his right to have; it was equally his duty to them, to make it. They requested him to join in selecting fair and competent men to appraise the property; this also he refused. When they had an appraisement made, they offered to buy his one third, or to sell their two thirds by it; this he refused. He thought the partnership was not ended; he mistook his rights, and therefore refused to do what he ought to have done. Under these circumstances, the defendants undertook to sell, by an appraisement which they supposed to be fair. They also mistook their rights, or rather their power. Under these circumstances, it would be unfair to inflict a penalty on the defendants by making them share the product of their skill and diligence with one who was in no way, either at law or in equity, or in conscience, a partner, because they made a mistake in the proper mode of transferring the title to the partnership property.

The complainant is not entitled to any account of profits earned since January 1st, 1864, but he is entitled to interest

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from that day, on the amount found to be then due to him from the assets of the firm.

Let an order be made referring it to a master to take an account on these principles.

McLENAHAN vs. McLENAHAN and JOHNSTON.

If lands descend or are devised, subject to a mortgage not made by the decedent, the heir or devisee takes *cum onere*, unless the decedent shall have assumed the debt in such manner as to show an intention to charge his personal estate. Making himself or his representative liable to be called on by the mortgagee, is not sufficient, of itself, to charge the personal estate in relief of the lands.

The bill was filed by the complainant, heir-at-law of Robert McLenahan, deceased, against his administrator and widow, to compel the administrator to pay a mortgage debt out of the personal estate of the intestate, in exoneration of mortgaged lands descended to the complainant, and to restrain him from settling his final account and distributing the estate until such payment shall have been made. The intestate had purchased the lands subject to the mortgage in question, but had not expressly assumed or covenanted to pay the mortgage by the deed to him, which only recited that the land was conveyed subject to the mortgage. The amount of the mortgage money had been retained by him from the consideration.

Answers were filed by the widow and administrator, and the cause was heard on a motion to dissolve the injunction granted.

Mr. Shipman, for Sarah Ann McLenahan, in support of the motion, contended:

That it was a settled principle, that where lands descended, subject to a mortgage debt not contracted by the intestate,

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but which was a lien on the lands when he acquired the title, the lands descended *cum onere* to the heir, and that he was not entitled to have the personal estate applied to pay the debt, in exoneration of the real. And for this he cited 2 *Jarman on Wills* 556, 559, &c.; *Cumberland v. Codrington*, 3 *Johns. C. R.* 229; 1 *Story's Eq. Jur.*, § 556; 2 *Ibid.*, § 1248; *Billinghurst v. Walker*, 2 *Bro. Ch. Cas.* 604, and 608-9, notes; *Keyzey's case*, 9 *Serg. & R.* 73; *Tweddell v. Tweddell*, 2 *Bro. Ch. Cas.* 101; 2 *Williams on Ex'rs* 1207; *Ram on Assets* [357]; 4 *Kent* 420; *Aldrich v. Cooper*, 2 *Lead. Cas. in Eq.* 226; *McLearn v. McLellan*, 10 *Peters* 625; *Hamilton v. Worley*, 4 *Bro. Ch. Cas.* 199; *S. C.*, 2 *Ves.* 62, note.

Mr. Vliet, for administrator, on same side.

The administrator is not liable for this debt. *Stevenson v. Black, Saxt.* 338; *Tichenor v. Dodd*, 3 *Green's C. R.* 454

And if he had been, he is discharged by the decree of the orphans court barring creditors, set up in the answer. *Nix. Dig.* 589, § 70; 590, § 74.

Mr. Van Syckel, for complainants, opposed the motion and contended:

That where the purchaser of an equity of redemption renders himself liable to pay the debt, his heir is entitled to have it paid out of the personal estate, in exoneration of the land. 2 *Jarman on Wills* 546; 4 *Kent* 420; 1 *Story's Eq. Jur.*, § 571; *Livingston v. Newkirk*, 3 *Johns. C. R.* 312; *Davies v. Topp*, 1 *Bro. Ch. Cas.* 524; *Galton v. Hancock*, 2 *Atk.* 424.

That whatever may be the rule elsewhere, in New Jersey it is settled, that when the equity of redemption is conveyed subject to the mortgage, and the amount of the mortgage is retained from the purchase money, the grantee is liable at law and in equity for the debt, to the mortgagee, and being personally liable, it must be paid out of his personal estate by his administrator. *Finley v. Simpson*, 2 *Zab.* 311; *Bolles v. Beach*, *Ibid.* 680; *Klapworth v. Dressler*, 2 *Beas.* 62.

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He further asked leave to amend the bill, by alleging that the intestate at the conveyance to him verbally promised the grantor to pay this debt.

He further cited and commented on *Bagot v. Oughton*, 1 P. W. 347; *Parsons v. Freeman*, Amb. 115; *Lawson v. Hudson*, 1 Bro. Ch. Cas. 58; *Evelyn v. Evelyn*, 2 P. W. 664; *Shafto v. Shafto*, *Ibid.*, note to p. 664; *Woods v. Huntingford*, 3 Ves. 130; *Tweddell v. Tweddell*, 2 Bro. Ch. Cas. 101, 153; *Cope v. Cope*, 2 Salk. 450; *Hayter v. Rod*, 1 P. W. 362; *Lingen v. Sowray*, *Ibid.* 172; *Chaplin v. Homer*, *Ibid.* 483; *Serle v. St. Eloy*, 2 P. W. 386.

THE CHANCELLOR.

Although the personal estate is the primary fund for the payment of the debts of a decedent, the rule is limited to debts created by him, or for which he has rendered himself personally liable, directly and primarily. Where lands subject to a mortgage debt, not created by the decedent, descend or are devised, the heir or devisee takes them *cum onere*, and is not entitled to have the debt paid out of the personal estate, unless the decedent has directly assumed the debt, intending to make it a charge on his personal estate, or shall have so directed expressly by his will. It is not enough that he has assumed to pay the debt, or has rendered himself liable to be called on directly by the creditor to pay it.

The authorities, ancient and modern, are uniform on these principles, although there is some difference as to what shall show the intention to assume the mortgage debt as a primary lien on the purchaser and his personal estate. The case of *Belvidere v. Rockfort*, decided in the house of lords, and reported in 6 Bro. P. C. 520, goes the furthest in favor of the heir. This case falls far short of that. In that, there was a covenant in the deed that the grantee would pay off the mortgage, "out of the consideration money in this present deed expressed." and even that case was doubted and disapproved by Lord Thurlow.

The authorities are collected in 2 *Jarman on Wills*, p. 546,

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&c., and are thoroughly reviewed and discriminated by Chancellor Kent, in *Cumberland v. Codrington*, 3 *Johns. C. R.* 229, which the great learning and ability of that distinguished jurist, will always make a leading case on this subject.

The decisions in New Jersey, relied upon for the complainant, do not affect the application of the rule as established in England, in this case.

In many of the English cases referred to, in which the personalty was held not to be liable to the debt, in discharge of the land, there were covenants to pay the debt, and the ancestor, or his personal representatives, could have been compelled to pay it. *Shafto v. Shafto*, 1 *P. W.* 664, *note*; *Tankerville v. Fawcet*, 2 *Bro. Ch. Cas.* 57; *Tweddell v. Tweddell*, *Ibid.* 101; *Billinghurst v. Walker*, *Ibid.* 604; *Butler v. Butler*, 5 *Ves.* 534.

The result at which Chancellor Kent arrives is this: "There must be a direct communication and contract with the mortgagee, *and even that is not enough*, unless the dealing with the mortgagee be of such a nature as to afford decided evidence of an *intention* to shift the primary obligation from the real to the personal fund." 3 *Johns. C. R.* 262.

There is, in this case, no contract with the mortgagee, and nothing to show an intention to shift the primary obligation.

The proposed amendment to the bill would not affect the result.

I am of opinion that the injunction should be dissolved, and the bill dismissed with costs.

GRIFFIN vs. GRIFFIN.

1. By the law of England, and of the state of New York, if a debtor deposits unrecorded title deeds with his creditor, as security for his debt, such deposit constitutes an equitable mortgage on the land for the debt. And this court will not compel the creditor, when he resides or is found in this state with deeds in his possession for lands in New York, so deposited in that state, to surrender them until the debt is paid.

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2. The fact that a title deed is not recorded, nor in the possession of the grantee, might be sufficient notice to a purchaser or mortgagee of such equitable pledge as to put him upon inquiry. But a widow of the pledgor, who purchases the title of his children and heirs, without any money consideration paid, is not a purchaser for value so as to dispute such equitable mortgage because not registered.

3. If the owner of lands pledges his deeds, which are his property, as security for a debt, neither he nor his heirs are entitled to their return until the debt is paid, apart from the doctrine of equitable mortgage.

Mr. B. C. Chetwood, for complainant.

Mr. J. P. Jackson, for defendant.

THE CHANCELLOR.

The complainant is the widow of Isaac Griffin, who died in the city of New York, on the thirteenth of March, 1864; he was seized at his death of two tracts of land at Spring Valley, in Rockland county, in the state of New York, on which he had resided for several years.

He died intestate, leaving two children, both of whom have, for the nominal consideration of one dollar, conveyed their interests in said lots to their mother, the complainant; the conveyance from one was before the filing of the bill, and that from the other is dated after filing the bill and answer, and after the complainant was examined as a witness in this cause.

The bill alleges that the deeds by which these lots were conveyed to James M. Griffin were not recorded, and that the defendant, about the time of the death of Isaac Griffin, came to the house of the complainant, and fraudulently, and without her knowledge, took and carried away these deeds.

She claims the right to the deeds as her muniments of title, she being the owner of the land, and the relief prayed is, that the defendant may be compelled to restore and deliver the deeds to her.

The defendant, by his answer, alleges that he lent to Isaac Griffin, who was his brother, in his life time, five hundred dollars, which was needed and used in part payment at the

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purchase of these two lots, for which Isaac agreed to secure him by a mortgage on these lots; that the mortgage was never given, and that Isaac, in the month of February before his death, at Kerr's hotel, in the city of New York, delivered to him these two deeds to keep as security for the payment of this loan of five hundred dollars, no part of which was paid; and he denies going to, or taking them from, the house of the complainant.

The evidence shows, without doubt or contradiction, that the defendant loaned Isaac Griffin five hundred dollars, which has not been repaid, and that Isaac Griffin, at Kerr's hotel, in New York, handed to him these deeds, to keep as security for that debt.

It further appears from the evidence, including that of the complainant herself, that for a month before his death, Isaac Griffin had not been at his house in Spring Valley where the complainant lived, but stayed at Kerr's hotel, in New York. That the complainant had instituted a suit for a divorce against him. That he was taken sick at Kerr's hotel, and the defendant, at Kerr's request, had taken care of him there, and removed him to his house in Newark. That the complainant did not take care of him in New York, nor, although in the city and knowing his sickness, did not visit him more than once, if at all, but after his removal to Newark, went out there, and in the absence of his brother James and his wife, took him back to New York to rooms provided by her there, where in a few days, he died.

The deeds were delivered by Isaac to James before he was taken to Newark; he claims to hold them as security for his debt, and offers to surrender them upon receiving payment.

Courts of equity, in England and in this country, have for many years recognized the validity of an equitable mortgage by the deposit of title deeds by a debtor with his creditor as security for the repayment of a debt, and have held that the mere fact that a creditor was in possession of the title deeds of his debtor, raised the presumption that they were deposited as security for the debt, and created an equitable mortgage.

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Coote on Mortgages 195; 3 *Powell on Mortgages* 1050; 4 *Kent* 150; 2 *Story's Eq. Jur.*, § 1020; *Russell v. Russell*, 1 *Bro. Ch. Cas.* 269; *Plumb v. Fluitt*, 2 *Anst.* 432; *Ex parte Mountfort*, 14 *Ves.* 606; *Ex parte Langston*, 17 *Ibid.* 230; *Ex parte Kensington*, 2 *Ves. & B.* 79; *Russel v. Russel*, 1 *White & Tudor's L. C.* 541; *Bozon v. Williams*, 3 *Younge & Jervis* 150.

This doctrine is acknowledged in the state of New York, where the land lies, and in which this transaction took place, and the laws of New York must govern as to the lien on the lands situated in it. *Jackson v. Dunlap*, 1 *Johns. Cas.* 114; *Jackson v. Parkhurst*, 4 *Wend.* 369; *Rockwell v. Hobby*, 2 *Sandf. C. R.* 9.

By the registry acts of New York, this equitable mortgage by deposit of the deeds, would be invalid as against a *bona fide* purchaser or mortgagee for valuable consideration, and without notice.

The complainant is not a purchaser for a valuable consideration. Her claim is as dowress and by releases from her children, which are for a nominal consideration; she does not prove any consideration. As to notice, one of the deeds to her was given and dated after answer filed, and after she had been examined as a witness and testified that it had been made to her without notice of the equitable mortgage.

Were she a purchaser for valuable consideration, the fact that no deeds were on record or in possession of the heirs, might be held sufficient notice to put such purchaser on inquiry. Few purchasers would take title under such circumstances.

Besides, without the established doctrine of an equitable mortgage, by the deposit of title deeds, the equity of the case is with the defendant. The decedent owed him five hundred dollars. He owned the deeds, they were his absolute property; he placed these unrecorded deeds in the hands of the defendant, to be kept by him as security until the debt due to him should be paid. Under these circumstances, a court of equity will not interfere in favor of the complainant until

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she does equity, and pays the debt for which the deeds were pledged. *Head v. Egerton*, 3 P. W. 280.

The bill must be dismissed with costs.

MARLATT vs. WARWICK AND SMITH.*

1. When a purchase is made at a sheriff's sale, under a parol agreement with the defendant in execution, that he shall be permitted to redeem, he will be entitled to a reconveyance, on paying what may be due to the purchaser.

2. If a defendant in a suit dies after the complainant has been examined as a witness, and his administrators are made defendants in his place, this evidence will be admitted at the hearing. The complainant was competent at the time when it was taken, and that is the test of admissibility. It cannot be rejected because the defendant was prevented from testifying by his death.

3. Inadequacy of price at a judicial sale is not, of itself, sufficient cause to avoid the sale, unless so gross as to be proof of fraud, or to shock the judgment and conscience.

4. If the plaintiff, at a sheriff's sale, sees that the defendant is under the impression that the plaintiff is purchasing for his benefit, and permits him to remain and act under it, and by means of that impression, and the co-operation of the defendant produced by it, purchases the property at an inadequate price, the purchase will be held to have been made in trust for the defendant.

The bill in this case was filed against Warwick and R. M. Smith. Smith died after answer filed, and the evidence in part taken, and his heirs and administrators were made parties. The bill sets forth that Marlatt, in 1861, confessed a judgment to Warwick, Smith, and J. C. Norris, and shortly after, another to Smith alone; and that, in 1862, his real and personal property was sold under these judgments by the sheriff; that Warwick and Smith, at those sales, became the purchasers of nearly all of the real and personal estate sold; that the sales were made, and the property purchased by them, under an agreement that they would purchase and

* CITED in *Hogan v. Jaques*, 4 C. E. Gr. 127; *Walker v. Hill's Ex'rs*, 6 C. E. Gr. 201; *Klopping v. Stellmacher*, Id. 329; *Dodd v. Wakeman*, 11 C. E. Gr. 485; *S. C.*, 12 C. E. Gr. 565; *Woodward v. Bullock*, Id. 513.

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hold the property for his benefit, after paying out of it the debts due to them, and their expenses, and give him the right to redeem it by such payment. And that because of that understanding, they were permitted to buy, and did buy, the property at prices far below its value.

The bill prays an account of what they have realized from the sale and produce of the property, and that they may be declared to hold the residue, and the proceeds of it, after payment of their debts and expenses, in trust for the benefit of the complainant, and may pay over and reconvey to him.

The defendants, by their answer, deny that there was any such understanding or agreement; that the sales were fair, open, public sales, at about the usual prices, and that on the sale of the real estate, Marlatt was expressly notified by them, that any property they might buy at the sale they would buy for themselves, and not for him. A replication was filed, and proofs were taken, and the cause was heard upon bill, answer, and proofs.

Mr. J. Wilson and Mr. P. D. Vroom, for complainant.

Mr. E. W. Scudder and Mr. Browning, for defendants.

THE CHANCELLOR.

The main controversy in this cause is upon the questions of fact. There is but little dispute, and no real difficulty, on questions of law.

It was settled in this court, in the case of *Combs v. Little*, 3 *Green's C. R.* 310, that when a purchase was made at sheriff's sale under a parol agreement with the defendant that he should be permitted to redeem, he would be entitled to a reconveyance, on paying what was due to the purchaser. This decision is founded on the plainest principles of equity. And the decision already made in this cause upon the demurrer to the equity of this bill, has settled the question here, and will preclude the defendants from raising it again.

Another legal question is on the admissibility of the evi-

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dence of the complainant, after the complainant had been examined.

R. M. Smith died intestate, and his administrators, widow, and heirs, were made parties. The act of 1859, (*Nix. Dig.** 928, § 34,) which allows parties to be sworn, excepts cases where either of the parties sue or are sued in a representative capacity. Had the suit been brought against Smith's administrators, or had Marlatt been offered, after they were substituted, he would have clearly been incompetent. When he was sworn, he was competent.

The position of the defendants is, that the competency must exist at the hearing, when the evidence is offered to be read, or at least, that the other party must have had an opportunity to be sworn; and that if he dies before the testimony is closed, without being sworn, the testimony of the other party who had been sworn cannot be used; that the plain intention of the act is, not to allow the testimony of one party when that of the other cannot be had.

But the words of this act are plain and unambiguous, and cannot be narrowed by a supposed intention not expressed; the words are, "nor shall any party be sworn in any case when either of the parties sue or are sued in a representative capacity." The prohibition is to "being sworn;" it makes the time of swearing the test; if the witness is competent, then the exception does not apply. This is in accordance with the well settled rule of evidence, both at law and in equity, that the objection to the witness must exist at the time of his being sworn; if a witness should, after being examined, die, become interested in the suit, or be convicted of crime, his testimony would not be rejected on that account. The testimony of Marlatt is competent.

Another question raised is, whether great inadequacy of price is sufficient in equity to set aside the sale, or to authorize the court to deem the purchasers trustees for the surplus above the judgment debts. The uniform current of the authorities settles that mere inadequacy of price, where parties stand on an equal footing, and there are no confidential

* *Rev.*, p. 378, sec. 3.

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relations between them, is not of itself sufficient to set aside a sale, unless the inadequacy is so gross as to be proof of fraud, or to shock the judgment and the conscience. *Bank of N. Brunswick v. Hassert*, Saxt. 1; *Simmon's Ex'r v. Vandegrift*, Ibid. 55; *Mercereau v. Prest*, 2 *Green's C. R.* 460; *Osgood v. Franklin*, 2 *Johns. C. R.* 23; *Howell v. Baker*, 4 *Johns. C. R.* 118; *How v. Weldon*, 2 *Ves., sen.*, 576; *Peacock v. Evans*, 16 *Ves.* 512.

But the judges in these cases are careful to say that *mere* inadequacy is not sufficient, and their language implies that when attended by circumstances which show that it would be inequitable to confirm the sale, it is a very important fact among other circumstances, to induce a court of equity to interfere; that when very great, it is, of itself, almost sufficient. Inadequacy of price then, can affect the sale only where it is great, very great, such as of itself to shock the judgment and the conscience. This question requires an examination of the evidence as to the value of the property and the prices brought.

The value of property is to some extent a matter of opinion and judgment; and even fair and intelligent witnesses will honestly differ very much in their estimates. In this case a number of such witnesses were sworn on both sides, and differ considerably about the value of the lands sold; yet from comparing their testimony, I think a result can be reached as to the value of most of the parcels, sufficiently satisfactory to base an opinion upon. As to the personal property, no evidence is offered of its actual value, but it is shown that it was sold under circumstances that induced the persons present at the sale to suppose it was being bid in for the benefit of Marlatt, and made them refrain from bidding, and that it sold below its value; perhaps at half its value; but this inadequacy on a sale of goods of such nature will not, standing by itself, be sufficient to declare the purchase fraudulent, or in trust for the debtor.

The lands sold consisted of ten tracts, sold in nine parcels,

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the value and price of which were different, and each must be considered separately.

The first tract was sold by itself; it was called the Home farm, adjoined the village of Hightstown, and contained ninety-four acres. From the proof, I consider it worth ten thousand five hundred dollars. It was subject to mortgages for six thousand five hundred dollars, with an arrear of interest of about two hundred dollars, leaving its value, subject to the mortgage, three thousand six hundred dollars; it was sold to Smith for one hundred and twenty-five dollars, or about one-thirtieth of its real value.

The second tract, called the Cutler farm, of one hundred and five acres, and the third tract, called the Meyers farm, of fifty-four acres, were sold in one parcel. Both had large, thrifty peach orchards in their prime; their value was fairly twelve thousand seven hundred dollars, or eighty dollars per acre. Deducting the amount of mortgages, nine thousand five hundred dollars, and seven hundred dollars interest in arrear, the equity of redemption was worth twenty-five hundred dollars; it was sold to Smith for one hundred dollars, or one twenty-fifth of its value.

The fourth tract, called the Milford lot, was sold to a stranger for about its value.

The fifth tract, known as the Scott farm, of eighty-four acres, was worth three thousand five hundred dollars. Deducting a mortgage for two thousand dollars with two hundred and forty dollars arrear of interest, the equity of redemption was worth one thousand two hundred and sixty dollars; it was sold to Warwick for fifty dollars, or one twenty-fifth of its value.

The sixth tract, or the Duncan lot, was sold to Smith for ten dollars, subject to mortgages; he shortly after sold it in the same condition for two hundred and twenty dollars, or twenty-two times the price he paid.

The seventh tract was the Cranberry farm, of twenty-eight acres; the title had been in dispute, and was tainted, but it had on it a large peach orchard, bearing a crop that year,

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which defect of title did not take away, and from the evidence, I judge that by time or settlement the disputed title was nearly at rest, and that the property would have brought, as it was, sixty dollars per acre, or one thousand six hundred and eighty dollars; it was sold to Warwick for six hundred dollars, a little more than one third of that value.

The eighth tract was called the store lot; it was worth two thousand five hundred dollars, subject to a life annuity of twenty-five dollars to a widow, in compensation of dower. If this was valued at five hundred dollars, the lot was worth two thousand dollars, and Marlatt owned half; it was worth one thousand dollars, and was sold to Smith for two hundred and seventy-six dollars, being a little more than a fourth of the value.

The ninth tract was one half of the Asher Moore lot, the whole worth two thousand dollars; and the half subject to the mortgage and interest was worth six hundred and fifty dollars; this was sold to Warwick for one hundred and thirty-five dollars, or one-fourth of that value.

The tenth tract was called the Dye farm, which contained one hundred and six acres; it was subject to a mortgage for four thousand dollars, on which two hundred and forty dollars interest was due; Marlatt owned half: that half was sold to Warwick for five hundred dollars. Its value was fixed by a sale shortly after, made by Warwick jointly with A. Perrine, who owned the other half; the price got was eight thousand six hundred and ninety-two dollars, or four thousand four hundred and fifty-two dollars above the encumbrances; of this, Warwick got for Marlatt's half two thousand two hundred and twenty-six dollars, being a sum more than four times greater than his bid at the sheriff's sale.

These tracts comprise the greater part of the sheriff's sales. It would be very troublesome, and it is not necessary for the purpose of this decision, to analyze the evidence as to the values of the peach orchards, and compare them with the prices.

The value fixed for the second parcel, composed of the

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Myers and Cutler farms, being eighty dollars per acre, is made reliable by the fact, that the Myers farm has been since sold on a foreclosure of the mortgage, and brought four thousand dollars, or seventy-four dollars per acre, after a large crop of peaches had been gathered from it. One great element of its value was its large peach orchard in full bearing; these yield well but a few seasons, and after one full yield the value of the orchard was greatly diminished, and this will easily account for the difference in price. Besides, the foreclosure sale being for four thousand dollars in cash, was a more severe test of the value than a sale subject to a mortgage for three thousand dollars, which required only one thousand dollars in cash to complete.

The result is, that real property, fairly worth eleven thousand four hundred and ten dollars, was sold by the sheriff to Smith and Warwick for seventeen hundred and eighty-six dollars, less than one-sixth of the value.

The dwelling-house of Marlatt had been conveyed by him to his son James at the commencement of his pecuniary embarrassment, for the alleged consideration of two thousand dollars; this consideration was made up by fixing that value on services supposed to be rendered by the son to the father; he was twenty-six years old, and unmarried, and had always lived with and been supported by his father; this homestead was worth four thousand dollars, and was unencumbered. Smith required this to be sold; he bought it for one hundred dollars. If these sales are held valid, Marlatt was insolvent, or so seriously embarrassed at the time, that this conveyance to his son may be held fraudulent and void as against creditors, in which case Smith would hold the homestead, worth four thousand dollars, for one hundred dollars. This would make the whole result, that they purchased property worth fifteen thousand four hundred and ten dollars, for eighteen hundred and eighty-six dollars, or less than one-eighth of its whole value.

The inadequacy of the consideration is great and gross, but I am not willing to hold that it of itself proves fraud, or that the court ought to infer, in order to save Smith and Warwick

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from the imputation of intending to perpetrate a great wrong, that they bought in trust for Marlatt, as Chancellor Kent did in *Howell v. Baker*.

I agree with the remarks of Sir Thomas Clarke, master of the rolls, in *How v. Weldon*, when he says: "The price for which the share was parted with, is about a fourth part. By the rule of the civil law, if half had been paid it would have been a mere nullity. *Our law differs from that*, but though the inadequateness of the value will not, of itself, be sufficient to set aside the contract, *yet it is a very material ingredient, and, with other things, will go a great way toward it.*" It is a fact in the case that would strongly support the proof, were it otherwise weak, that the purchases were made for the benefit of Marlatt.

The next question of fact is, whether these purchases were made by Smith and Warwick, under an express agreement by them with Marlatt, that they would buy in the property for his benefit, and hold the same in trust for him, after they had realized the amount of their debts, costs, and expenses.

The bill charges this to be the fact; the answer expressly denies it. It is one of the principal questions in the cause. Its consideration involves a review of a large amount of evidence. The burthen of proof is upon the complainant. If he relies upon the agreement he must positively show its existence, and as the defendants have denied it under oath, in an answer clearly responsive to the charges of the bill, he must prove it by more than one witness. Two witnesses, or one witness, with such circumstances as are equal to a second witness, are necessary before the court can allow itself to be convinced that the answer is not true. No more than this is required, because two defendants have sworn to the denial in the answer.

In moral influence, the denial of two defendants would have more effect than the denial of one, except in cases where, as in this, the promise charged may have been made by one. Smith and Warwick were combined in interest, and were acting together in this matter in such way that the promise

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or agreement of one, made for both, in the absence and without the authority of the other, would bind both.

In July, 1861, Marlatt was indebted to Warwick, Smith, and James C. Norris, separately, for money borrowed, and they severally were security for him as accommodation endorsers on notes running to maturity and discounted in bank to large amounts. He was extensively engaged in the peach business, and had invested large sums of money in it. The failure of the peach crop for several years, and its then certain failure for that year, made it evident that he could not meet his notes at maturity. He had a large amount of property, and though it was largely encumbered, he estimated it as worth at least twenty thousand dollars more than his debts. Alarmed either by his situation, or the urgency of creditors, (it is really of little importance by which,) he offered to secure these three by mortgage. Warwick and Norris may have requested security before he offered it; Smith did not. They, upon consultation, thought it best that Marlatt should give a judgment bond, and confess judgment to them; Marlatt consulted Smith about the propriety of this; Smith had been his old neighbor and friend, had been engaged with him in jointly purchasing property, and he had been for many years surety on the bond of Smith, as state treasurer. Smith was a man of business capacity and intelligence, and his reputation for these and for integrity, was well known in the state. He had Marlatt's confidence, and stood in such relation to him, that Marlatt naturally would rely on him as his adviser, even in matters where Smith had an adverse interest.

Marlatt's object was to secure these creditors. He proposed to do it by a mortgage. They preferred a judgment, that they might cover all his personal and real property, and have the enforcement of it at their own disposal; it was for them the best security. By Smith's advice he gave it, and as Marlatt alleges and swears, upon their promise that they would not press him unnecessarily, or sacrifice his property; and that if a sale became necessary, they would buy in the property

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for his benefit, after paying the amounts due to themselves out of it; these promises Smith and Warwick deny explicitly in their answer, and Warwick and Norris in their testimony. A bond, with warrant of attorney to confess judgment, and conditioned for the payment of six thousand nine hundred and seventy-one dollars and ninety cents, was given by Marlatt to Smith, Warwick, and Norris, and dated July 22d, 1861. A like bond and warrant was given by Marlatt to Smith, dated January 20th, 1862, conditioned for the payment of six hundred and twenty-four dollars, an amount inadvertently omitted in the first bond. There is no question about the consideration or fairness of these bonds; Marlatt really owed the amounts. On both, judgments were entered immediately after their respective dates, executions issued, and levies made on all his property.

Marlatt alleges and swears, that a few months after the date of the first judgment bond, Smith and Warwick represented to him that it would be better for him to have a sale under the execution; that such property as would bring a fair price could be let go, and the price credited on his debt; and that they would buy in such as might be struck off at a sacrifice and hold it as security for his debt, and allow him to redeem it; and that under this promise the sales by the sheriff were had; that he, Marlatt, consented to it by reason of his confidence in the friendship and judgment of Smith.

The defendants, Smith and Warwick, in their answer explicitly deny that they made these promises and representations; but it is a naked denial, without showing whether anything, or what, passed between them on this subject. And they further say that they distrusted him on account of his litigious spirit, and took the advice of counsel a day or two before the sale of the real estate, as to what course to pursue at such sales to avoid any implication with him, and were wary and cautious about making any promise or representation that might complicate them; and that, by advice of their counsel, they notified Marlatt before the sale and at the sale, both privately and in public, that what they might buy

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they should buy for themselves; and that Smith, in telling him so on the day of sale, told him if he did not wish his property sold at that time he must have the sale adjourned, and that Marlatt permitted the sale to go on without any effort to adjourn.

Their denial of the representation and promises is responsive, and must be taken as true, unless overcome. Marlatt himself is the only direct witness to prove them, unless the testimony of W. Hutchinson, who heard Warwick say, in 1863, that he now had his money, and he wanted to settle with Marlatt, and be out of the affair, is considered as direct evidence. But on this point there is a strong and accumulated weight of circumstantial evidence, that cannot be overlooked or disregarded. This bears strongly, too, upon another important point, the notice given to Marlatt, at and before the sale of the real estate, that they intended to buy for themselves. Marlatt says he was told by Warwick on that day, before the sale, that Smith wanted to see him to have some little evidence, for fear there might be trouble with his other creditors; and that, in consequence of this, he took the notice given to him by Smith and by Warwick, that they could buy for themselves only, when given to him in presence of witnesses, as done to save appearances with the public, and not to affect the understanding between him and them.

The sale of the personal property was conducted in such manner as convinced many of the neighbors attending, that it was intended to buy in the whole for Marlatt's benefit. Marlatt himself interfered with bidding, and the whole affair, as shown by the testimony, was so managed that the bystanders would naturally come to that conclusion; the result was that there was but little or no competition. All the property, with slight exceptions, was bought in by Warwick, for himself and Smith, or was transferred to them after the sale, and the amount realized was quite small, compared with the value of the articles sold; most, if not all, bought by Smith and Warwick, was left on the ground, in the possession and use of Marlatt, who continued there as before, using all, and

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consuming and selling some of it. Marlatt acquiesced in, and aided the hasty manner of sale, and did not protest against it, or request his friends and neighbors who stood there evidently deterred from bidding by some cause, to aid him by bidding at the sale. They understood his interest and wishes to be the other way, and regarded them.

Smith and Warwick had occasion for their money, but they had no use or occasion for the household goods, or other personal property of Marlatt. The natural course of things would have been for them to have invited and encouraged competition and let strangers buy. And Marlatt's conduct cannot be explained on any hypothesis, except that he believed they were buying for his benefit.

This sale was on the twenty-seventh day of January, and on the 31st of March, two months later, the real estate was sold. In the meantime, Marlatt had been left in the use and possession of the personal property; the position and comfort of himself and family had not been disturbed, nor does he appear to have received any notice that this state of affairs was only temporary, and that he must soon give up everything to them. The first notice he received was on or about the day of the sale of the lands. As to this, the fact that Smith and Warwick went to counsel to get advice about their course is somewhat significant. If there was no agreement, why did they want advice. They may have wanted it, because they saw that Marlatt supposed they were buying for his protection. But if the recollection of their counsel is correct, they did not disclose to him that fact. His impression is that he originated the advice as to notice, on account of his knowledge of Marlatt's litigious habits.

Warwick clearly contradicts Marlatt's story, that he told Marlatt that Smith's notice was to be given for the purpose of protecting the sale against other creditors; and as the burthen of proving this is on Marlatt, he requires further evidence. He has no further direct evidence on this point, but there is much in the circumstances that proves that he must have so understood the notice, if Warwick did not tell him

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so. Warwick recollects but one conversation on the subject; that in the hall of the tavern, in presence of Meesler and Perrine. The answer of Smith and Warwick states that they told Marlatt this, both in private and before witnesses; if true, they must, either together or severally, have had a private conversation with him before he was let into the hall to be warned before witnesses; his conduct there, as proved by the witnesses, shows that this notice did not produce the effect that it must have done had he not been notified of it, or supposed it a mere form; he made no reply, but walked off unexcited, saying or muttering something that was not understood.

The next scene is the sale in the bar-room. Here ten tracts of land, the bulk of Marlatt's property, the whole result of the active life of a man now sixty, was sold in an hour, or half an hour. So far witnesses differ.

The time itself is unprecedented in a sale in the country, of such a number of tracts, of so great value, when the sale was a real one. There were enough persons assembled to make a real competition; there were real purchasers for some of the valuable tracts. Some inquired as to encumbrances; there was no answer. Smith knew, but declined or omitted to tell, he intended to buy; Warwick knew, but did not answer; above all, Marlatt, who gave the mortgages, knew, and omitted to tell; his son James knew, and did not tell. The sale went on, and the bystanders, justly and of necessity judging that the property was to be bought in for Marlatt, did not bid. Marlatt had been told that what might be bought by Smith and Warwick would be for themselves only, and not for him; that if he wanted to protect himself he must have the sale adjourned. He saw bidders driven away, and his property sold for a song, including the house in which he lived. All that was needed to secure a fair sale, was to have told the encumbrances on each tract, or to have asked for the offered adjournment, to ascertain them satisfactorily. Yet he asked for no adjournment, was silent as to the encumbrances, discouraged purchasers, and beyond all, though of

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a litigious, troublesome disposition, was not displeased with the men that were so ruthlessly ruining him and his family, but was whispering to and conversing with them, as if conspiring with them against the public, to aid in his own destruction.

It is impossible to believe that he would act as he did on that day, unless under the impression that the land was being bought for his ultimate protection. And the inference is just as certain that Smith and Warwick, when this sale was going on, saw and knew that their notice of the morning had not been understood, and that he still supposed that they were buying for his protection. These conclusions, from the evidence, appear to me to be irresistible. I can have no doubt.

The fact that Smith, who held in his hand a paper that purported to contain an account of the encumbrances, did not communicate the amount to the bidders, is established. Were it otherwise, and were it made to appear that he did inform them from that paper, the fact that the encumbrances on each of the two parcels first sold are overstated by three thousand dollars, might be sufficient to set aside the sale of those two tracts. Such a misrepresentation, made by the person who became the purchaser, whether innocently or fraudulently, should set aside the sale.

The conduct of the parties, after the sale, in the management of this property, gives strong support to the evidence of Marlatt.

He continued in possession of the homestead, and, to some extent, in the management of several of the farms. The produce was stored with him, and some of it used by him at pleasure. He and his wife and son were actively engaged in the business and work of gathering peaches, assorting them, and preparing them for market, and this without compensation. Marlatt says he had none; Warwick says he was allowed, like the other laborers, one dollar per day, a matter hardly credible, if it were entirely uncontradicted. I cannot believe that Marlatt, after he knew that all his property had

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been placed by the sale in their hands, for a nominal price, and they been enriched by his ruin, would have voluntarily continued serving them with all his skill and energy, for no pay, or nominal wages.

I am not willing to believe that the answers of Smith and Warwick are untrue, when they deny that any promise or agreement was made with Marlatt to purchase the property for his benefit, and allow him to redeem it when his debt was paid. I would rather believe that, supposing him to be litigious and troublesome, they may have carefully avoided making any direct promise, and yet have led him to expect that this would be done, by representing what was the usual course, or what might be done to protect him, if he would confess a judgment to them; they meaning to deal justly with him, but to keep the power in their own hands. Few men in his situation confess judgment, without such representations or prospect.

I can believe the notice given at the day of sale to Marlatt, was substantially as they state it, yet, acting as they had done until that time, in concert, and with the supposition on his part that they had been purchasing for his benefit, it would be an effort for them to give him a notice couched in plain terms that they were his antagonists in that matter from that time; they would shrink from it. They would more probably tell him that they had been advised by counsel to give that notice, to save trouble, and he must not think hardly of it. If they shrink from saying that the trouble feared was trouble with him, he would not be alarmed. This may be speculation, but in whatever way the matter occurred, the result is certain. Marlatt saw his property sold under the mistake that they were purchasing for his benefit; and they, knowing his mistake, bought the property on unequal terms, reaping the advantage of his error. From their subsequent conduct, I have no doubt that they intended to do him justice; and their only object was to keep the control in their own hands, so as to determine themselves what was that justice, without danger of litigation from him. Warwick's

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admission to Hutchinson, and Smith's answer to Marlatt's applications for settlement, show that intention. When Marlatt, by frequent and repeated urgency and reproaches, and above all, by an unwarrantable public attack upon Smith at a political meeting of mutual friends, peculiarly calculated to affect strongly a person in his situation, offended Smith, it was not to be wondered at, that he should refuse to speak to, or negotiate with him further, and resolved to let him see that he had him in his power. Then Smith refused to negotiate when Warwick was willing.

I am gratified to arrive at this conclusion, to which the evidence plainly leads, as it relieves the defendants from any imputation, either of untruthfulness in their answer, or of intending to take advantage of the false impressions of Marlatt to obtain his property at such grossly inadequate prices. It is difficult to say which, under the circumstances, would be the darkest stain.

A sheriff's sale made, and permitted by Marlatt to go on, under so serious a mistake, when it was in his power to prevent it, cannot be permitted to stand. To correct mistakes, and avoid transactions made under the influence of mistakes, is one of the plainest and most ancient heads of equity jurisdiction, and it has been frequently used in cases of sheriff's sales. *Seaman v. Riggins*, 1 *Green's C. R.* 214; *Howell v. Hester*, 3 *Green's C. R.* 266; *Campbell v. Gardner*, 3 *Stockt.* 423.

The purchase, in this case, of the complainant's property by Smith and Warwick, under the circumstances, must be decreed to be made in trust, to permit him to redeem it by paying the amount due to them and the expenses incurred by them. An account must be taken of what they have received from the sale or the rents of the property, and for the proceeds of the lands sold by them.

The defendants must be allowed all the proper expenses incurred about the management of the property, and a fair compensation for their pains and trouble in such management. Let the master allow for the trouble of management one half

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of the net yearly proceeds of the lands managed and cultivated by them, after paying all expenses, taxes, and repairs; and during the time that Marlatt participated in the working and management of the property, let this be divided between Marlatt and the defendants; Marlatt to have one half. After Marlatt ceased to aid, let the whole be allowed to the defendants until the receiver took charge; the homestead of Marlatt, and its proceeds, not to be taken into account. If the net amount already received by the defendants, in money, is not sufficient to liquidate the debt to them, enough of the property must be sold to pay the deficiency; and if they have received more, they must pay the excess to Marlatt.*

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1. A one sided or unilateral contract, by which one party binds himself to convey lands, and the other party is not bound to purchase, is not favored in equity, and will not be enforced, if without consideration. But if it is part of a lease, or made at the same time with it, and in consideration of the lease, it will be enforced.

2. A mistake as to the legal effect of an agreement, will not avail the defendant, unless led into it by fraud, or the representations of the complainant.

3. A stipulation that the complainant shall have the privilege of purchasing at a certain price is, in equity, tantamount to an agreement to convey at that price.

4. When the wife of the defendant refuses to join in the conveyance, and such refusal does not appear to be by collusion between her and the defendant, if the complainant is not willing to accept the title without her joining, the court will not compel the defendant to indemnify the complainant, and specific performance will not be decreed.

This cause was argued on final hearing, upon the pleadings and proofs.

Mr. S. Tuttle, for complainant, cited 1 *Story's Eq. Jur.*, §

* Decree affirmed, 4 *C. E. Gr.* 439.

† CITED in *Pinner v. Sharp*, 8 *C. E. Gr.* 282; *Reilly v. Smith*, 10 *C. E. Gr.* 159; *Lounsbury v. Locander*, *Id.* 557; *Peeler v. Levy*, 11 *C. E. Gr.* 335; *Scott v. Shiner*, 12 *C. E. Gr.* 187.

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715, 716, 746, 757, 779; *Young v. Paul*, 2 *Stockt.* 401; *Smith v. McVeigh*, 3 *Stockt.* 239.

Mr. H. A. Williams, for defendant, cited *Smith v. McVeigh*, 3 *Stockt.* 239; *Stoutenburgh v. Tompkins*, 1 *Stockt.* 332; 1 *Story's Eq. Jur.*, §§ 750, 732, 733, 735.

THE CHANCELLOR.

This suit is to compel the specific performance of a contract to convey a house and lot in Paterson.

The defendant, on the first of August, 1856, leased the premises to the complainant for seven years and six months, at the yearly rent of three hundred dollars; this lease was under seal. By a written agreement, not sealed, but endorsed on the lease, and signed by both parties at the time of executing the lease, it was agreed, "that at the expiration of the said term, Hawralty shall have the privilege of purchasing the whole of said premises, paying therefor, as purchase money, the sum of four thousand dollars." The complainant, on January 19th, 1864, offered the defendant to pay him the consideration money, without tendering it to him, and requested him to have the deed ready for him on the first of February. The premises, at the date of the lease and contract, were subject to three mortgages, previously given by the defendant and his wife, amounting to the sum of fifteen hundred and twenty dollars, or thereabouts, and in the year 1861, another mortgage was given by them on the same to the complainant; all of which mortgages are unpaid.

The complainant alleges that he has been always ready, upon receiving a good title, free from encumbrances, to pay the purchase money, or to receive it subject to the encumbrances, paying the excess of the purchase money above the encumbrances; and prays that the defendant may be compelled to perform his contract, offering, on his part, to perform the same, by paying four thousand dollars for a good marketable title, free from encumbrances, or by paying the

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excess of said four thousand dollars above the encumbrances, if the defendant shall be unable to remove them.

The defendant, in his answer, sets up that the contract is not under seal, and is without consideration, and without mutual obligation, on part of the complainant; that it contains no legal covenant or agreement on his part to convey; that it was made by him under a misapprehension of its nature, and that he is unable to make a good marketable title, because his wife is unwilling to join in the conveyance.

The contract is not under seal, and is not mutual. The complainant is not under any obligation to purchase, either at law or in equity, and the defendant can have no remedy on it. These unilateral or optional contracts are not favored in equity, and it has been held, both in Great Britain and this country, that want of mutuality of obligation and remedy, is a bar to specific performance. *Lawrenson v. Butler*, 1 *Sch. & Lef.* 13; *Parkhurst v. Van Cortlandt*, 1 *Johns. C. R.* 282; *Benedict v. Lynch*, *Ibid.* 370; *Smith v. McVeigh*, 3 *Stockt.* 239.

But modern authorities have narrowed this doctrine down to cases in which there is no other consideration. And it is now well settled that an optional agreement to convey, or renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity, if it is made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it. *Hatton v. Gray*, 2 *Chan. Cases* 164; *Backhouse v. Crosby*, 2 *Eq. Cas. Abr.* 32, *par.* 44; *Backhouse v. Mohun and Crosby*, 3 *Johns. R.* 434, &c.; *Seton v. Slade*, 7 *Ves.* 265; *Fowle v. Freeman*, 9 *Ves.* 351; *Western v. Russell*, 3 *Ves. & B.* 192; *Ormond v. Anderson*, 2 *Ball & B.* 370; *Clason v. Bailey*, 14 *Johns. R.* 484; *In re Hunter*, 1 *Edw. C. R.* 1; *Woodward v. Aspinwall*, 4 *Sandf. S. C. R.* 272.

In this case, the agreement was executed at the same time with the lease, and was part of the same transaction, and must, for this purpose, be treated as if part of the lease.

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In taking a lease, a tenant may be willing to pay a high rent for a number of years, provided the landlord will give him an optional right to purchase at a fixed price. And it is to be presumed that the landlord would not agree to such a boon, unless he had a consideration in the lease. Any sufficient consideration would make such unilateral contract binding in equity.

The answer alleges that the contract was made under a mistake, or misapprehension of its effect. A mistake on the part of the defendant as to a contract, would be a defence here in a suit for specific performance, although it would not affect it at law, or be ground for setting it aside in equity. *Fry on Spec. Perf.*, § 478. But a mistake as to the legal effect of the agreement by the defendant, will not relieve him, unless led into it by fraud, or the representations of the complainant. *Fry on Spec. Perf.*, § 508; *Beaufort v. Neeld*, 12 *Clark & Fin.* 248.

The whole evidence of the mistake or misapprehension, is in the testimony of the defendant himself. He understood the words of the contract, and supposed they bound him to convey. The scrivener employed by both parties, told him it would not bind him. The testimony is not supported by any of the witnesses who were present, and it is very difficult to believe that the defendant supposed that a contract to sell, which complainant had for years been endeavoring to get signed by him, was, when signed, to have no binding effect. This defence is neither sufficient in law, nor sufficiently proved, to affect the written contract.

The objection that the agreement contains no covenant or agreement on the part of defendant to convey, is literally true. The words are, the complainant "shall have the privilege of purchasing," and although not so comprehensive as a positive agreement to convey, which is settled to mean, when not qualified by words or circumstances, to convey the fee, yet are sufficient in equity, to entitle the complainant to a conveyance of all the estate of the defendant at the time of the contract. It is not necessary to settle here, whether

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these words would be sufficient at law or in equity, to compel the defendant to procure a good title, or make compensation for encumbrances, as the inability of the defendant to procure the conveyance of the right of dower of his wife, must be a bar to the decree of specific performance.

The complainant, in his bill, requires a marketable title, and offers to take that only; a title subject to the dower of a wife is not marketable.

The defendant, in his answer, says that he cannot give a marketable title, that his wife will not release her dower. This is responsive to the interrogatory in the bill, whether he cannot make a marketable title, and why; and must be taken as true; it is not contradicted or shown to be by procurement of the defendant.

This court will not order a defendant to procure a conveyance or release by his wife, or require him to furnish indemnity against her right of dower, unless in cases of clear fraud. The doctrine of indemnity, in such cases, is no where carried farther than in *Young v. Paul*, 2 *Stockt.* 401, and the opinions of the Chancellor and Court of Appeals would exclude a case like this.

In case of a mere optional contract, it is much better to leave the party to his remedy at law.

The bill must be dismissed with costs.

SHEPHERD'S EXECUTRIX vs. MCCLAIN and MURRAY.*

1. In a suit by an executrix in her representative capacity, the defendant cannot testify for himself, unless the complainant has first been sworn on her own behalf.

2. A person who, with the funds of the mortgagor, and as his agent, has paid off a mortgage, cannot keep the security alive by having it assigned to himself. And a purchaser from the mortgagor can defend a suit to foreclose it, without the mortgagor being made a party.

3. Equity has not adopted the rule at law, that when a plaintiff sues in a representative capacity, and fails, no costs shall be awarded against him.

* CITED in *Walker v. Hill's Ex'rs*, 7 *C. E. Gr.* 516; *Wycoff v. Combs*, 1 *Stew.* 42; *Hartman v. Alden*, 5 *Vr.* 523; *Mulford v. Peterson*, 6 *Vr.* 135.

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But where the suit is brought in bad faith by the complainant, he will be ordered to pay the costs out of his own estate ; and when brought upon an instrument obtained by the decedent by a breach of faith, costs will be ordered to be paid out of the estate of the testator.

The bill in this cause was filed by Elizabeth Shepherd, executrix of Joseph Shepherd, to foreclose a mortgage for \$500, dated September 17th, 1847, alleged to have been given by one Jonathan McClain to one William Henry Grant. It alleges that, on or about the 13th day of December, 1847, the said Jonathan McClain conveyed all his right, title, and interest in the mortgaged premises to one Douglass McClain ; and that said Douglass McClain, on or about the 28th day of March, 1859, conveyed all his right, title, and interest in the same to one William A. McClain. It further alleges that, on the 30th day of March, 1850, the said Grant assigned the said bond and mortgage to one William Haight, executor of Charles Haight, deceased, his executors, administrators, or assigns, subject to the equity of redemption of the said Jonathan McClain, in the mortgage aforesaid ; and that the said bond and mortgage were, by the said Haight, afterwards assigned to one Matthew McDowell, subject to the said equity of redemption ; and by the said McDowell assigned to one Thomas Stout ; and by the said Stout to one Stephen J. Crawford ; and by the said Crawford to Joseph Shepherd, complainant's testator ; all subject to the said equity of redemption of the said Jonathan McClain.

It sets out that a judgment was recovered by one William W. Murray, against the said William A. McClain and one Peter C. Smock, for \$223.48, but charges it, if a lien at all upon said premises, to be subsequent to Shepherd's mortgage. It sets out the execution of a will by the said Shepherd, and his subsequent death ; the proof of the said will by the said executrix, and her assumption of the burthen of its execution. It charges that no part of the principal of the said bond has been paid, but that the same, together with interest thereon, is now due to the said executrix.

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The defendant, William A. McClain, by his answer, admits that the conveyance to him of the said premises, was subsequent to the mortgage aforesaid, but denies that that conveyance was made to him with full knowledge thereof, either on the part of Douglass McClain, or of the said defendant. He alleges that, at and before Douglass McClain executed the deed to him, the said mortgage was paid off and satisfied by the said Douglass in full, and that such satisfaction and payment were known to the said Joseph Shepherd, at the time of the execution of said deed to defendant. He further alleges that the said Douglass McClain disappeared on or about the first day of March, 1859, and that nothing could be ascertained with regard to him, though diligent inquiry and search was instituted and made for him, and that supposing him to be dead, the said Joseph Shepherd and Deborah P. McClain, widow of said Douglass, took out letters of administration upon his estate; that the said Shepherd alone took an active part in the administration of the estate, and had the charge and management of all receipts and disbursements, and that while acting as such administrator, and possessed of a considerable amount of funds belonging to the estate, and with a part of said funds, the said Shepherd paid off the mortgage hereinbefore mentioned, and took an assignment of it to himself. His executrix now seeks a decree of foreclosure upon this mortgage.

The cause was argued upon final hearing, upon the bill, answer, and proofs.

Mr. W. H. Vredenburg, for complainant.

Mr. R. Allen, jun., for defendants.

THE CHANCELLOR.

The only question in this case is one of fact. If Joseph Shepherd in his lifetime, paid off the mortgage on which a decree of foreclosure is sought in this suit, with the money of Douglass McClain in his hands, then the mortgage was

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extinguished, and his taking an assignment of it could not keep it alive or prevent parol evidence being given of the fact that he paid it with money of Douglass McClain. In considering the evidence, I lay out of question the testimony of the defendant, William A. McClain. The act admitting parties to be sworn, clearly excepts the case where either party sues, or is sued, in a representative capacity; and the supplement of 1866 only permits parties to be sworn in cases where such representative has so elected by being sworn. The complainant has not so elected.

But laying out of question the evidence of the defendant, the proof is full and clear, and without contradiction, that this mortgage was paid off by Joseph Shepherd with money of Douglass McClain, collected for the purpose. If this is so, nothing that he could do would ever revive the mortgage or make it a valid security in his hands. He intended to pay it off, and represented to Douglass McClain, at the giving of the deed to his son, that it was paid off, and did not object when he was requested to cancel it. The deed covenanted that the property was free from encumbrances. He prepared this deed and stood by when it was executed, and laying out of question the doctrine of estoppel, this is not to be reconciled with the fact that he held the mortgage as an existing encumbrance.

It is not necessary, under these circumstances, that there should be an account between the complainant and Douglass McClain, or that the latter should be a party to this suit.

In this court, costs, by the statute, are in the discretion of the court. In general, that discretion is exercised according to rules that have been fixed by practice. Courts of law, by statute, *cannot* award costs against executors or administrators when plaintiffs, but *must*, if they are unsuccessful defendants. Courts of equity are not within that statute, and have not adopted it in practice. 2 *Daniell's Ch. Pr.* (3d Amer. ed.) 1462.

It is an arbitrary rule, and if this court adopt it, it cannot award costs as the act regulating their practice requires,

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according to its discretion. The mortgage was retained by Shepherd in bad faith, contrary to his duty and his promise to have it canceled on record. If his executrix was misled by finding it among his papers, his estate, not the defendant, should pay the costs. If the complainant, in bad faith, or negligently, when inquiry would have informed her, brought this suit, she ought to be ordered to pay the costs herself. *Roosevelt v. Ellithorp*, 10 Paige 415.

On this point I have had some doubts, but on the whole, will award them out of the estate, and not to be paid by the complainant personally.

The bill must be dismissed with costs out of the estate of complainant's testator.

BURNHAM and WIFE vs. DALLING.*

BALE vs. same.

MILLAR and WIFE vs. same.

1. If a guardian, with the consent of his wards when of age, agree to give time for the payment of a security in his hands belonging to them, upon receiving the guaranty of a third person, at a charge of ten per cent., the guardian, in the settlement of his accounts, will be allowed the ten per cent. paid under that arrangement.

2. No defence can be allowed at the hearing which is not set up in the answer, and no evidence can be received on any issue not raised by the pleadings.

This cause came up for hearing upon exceptions by the complainants to the master's report.

Mr. Woodruff, for exceptants.

Mr. H. A. Williams, for defendant.

* CITED in *Foster v. Dey*, 12 C. E. Gr. 601.

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THE CHANCELLOR.

This cause comes up on exceptions taken to a master's report, made in the above three suits, brought to compel the defendant to account to the several complainants as their guardian. These suits had been consolidated into one by order of this court, before the reference.

The accounts are long and complicated, and involve some intricate questions of fact and law. The report of the master is made with care and ability, and presents the situation of the estates and the conclusions of the master with great clearness.

There is no real difficulty as to any of the exceptions, except so much as relates to the amount of \$5911.73, alleged to have been received by Dalling as guardian, from John Hutchins, the administrator, in the state of Ohio, of William Bale, the father of the complainants. This was part of the proceeds of the sale of real estate in Ohio, belonging to the decedent. The bills charged that the defendant had received this sum in money or securities from Hutchins as administrator, and had remitted the securities to Hutchins to collect for him as guardian. The answers deny that he had received the sum in money, but admit that he had received a note of William P. Goodrich for that sum, payable in six years; that this note was not paid at maturity, and that he returned it to Hutchins, and it was received by him; that it was not returned to Hutchins to collect for him as guardian, but to collect for the heirs.

It was shown that such a note, secured by mortgage on the property sold, was taken by the administrator, and by him paid over to defendant; that when it came to or near maturity, it was thought by all concerned, that the maker would not be able to pay it, and that the mortgaged premises, subject as they were to a prior mortgage, would bring but a small part of the sum. A proposition was made to give additional security for the amount, upon receiving an extension of the time for payment. Hutchins advised this, and

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offered as an inducement to accept it, that he would, for ten per cent., assume the trouble and expense of collecting it, and would guarantee its payment. This proposition was accepted, and a written agreement sanctioning it, was signed by Hutchins on the one part, and by Elizabeth Bale, (who afterwards married the complainant, Burnham,) John Bale, and the defendant as guardian, on the other part. The complainant, Margaret Millar, did not sign it, as her share of this money was paid to her in another way; but it was signed in the presence of her husband, John D. Millar, who is the attesting witness to it. John Bale was over twenty, and not yet twenty-one, but had, after arriving at full age, adopted and approved it. John Hutchins, the administrator, has paid into this court the full amount of the principal and interest due in this matter, less the ten per cent., which is now the only amount in controversy.

I think these facts fully justify the master in the conclusion to which he has arrived, that the heirs of William Bale had taken the collection of that amount upon themselves, and discharged the defendant from accounting for it; that they had agreed to allow the ten per cent. for trouble and guarantee, and that the defendant could not be made liable for it on the ground that it was an improvident and useless expense.

But a serious question was raised, and pressed with great ability by the counsel for complainants, upon the right of the master to receive or consider this agreement upon the pleadings in this case. The agreement was not set up in the answer, and it was contended that the defence set up by it was not in the issue made by the pleadings.

It is, without doubt, a well established principle, that no defence can be allowed that is not set up in the answer, and no evidence received, except on some issue raised by the pleadings. 1 *Daniell's Ch. Pr.*, (3d Amer. ed.) 726; *James v. McKernon*, 6 *Johns. C. R.* 565; *The Barque Chusan*, 2 *Story's R.* 468-9; *Gres. Eq. Ev.* 159; *Brantingham v. Brantingham*, 1 *Beas.* 162.

The only question is as to the application of the rule to these pleadings. The issue raised is whether the defendant

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sent this note to Hutchins as his agent, to be collected for him as guardian, which is charged by the bill, or, whether he returned it to him to be collected by him for the children of William Bale, as set up by him in the answer denying the charge in the bill. On this matter, the bill does not seek to make him liable in any other way. It does not charge him with carelessness in accepting a bad note, or in returning a good note secured by mortgage, and taking securities for a less value. And on the issue as made, this agreement of the children of Bale with Hutchins, is proper evidence. It shows clearly that the note was returned to be collected by Hutchins for the children of Bale, as alleged by the defendant's answer. The conclusion of the master is correct, and the evidence by which he arrived at it legal and admissible.

On the points raised by the other exceptions, the master's report is fully sustained by the evidence, and the exceptions must be overruled.

Except in the matter of setting up in his answer the irregular and void accounts rendered in the Orphans' Court as a defence to his accounting here, for which he was ordered to pay the costs until the interlocutory decree, the conduct of the defendant, both in the management of the estate of his wards, and in conducting his defence in this cause, has shown capacity, integrity, and candor; and beyond this he has displayed activity, energy, and zeal for the interest of his wards, and the kindness and generosity of a parent toward them. There is no reason why he should be made to pay any of the expenses of this accounting out of his own pocket. I shall not disturb, directly or indirectly, the order for costs on the interlocutory decree; but shall order the costs of the defendant, and a proper fee for his counsel, to be paid out of the estate.

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HALSTED vs. MEEKER'S EXECUTORS.

1. Where a bill contains only a special prayer for relief, no other relief can be granted. And if the facts set forth in the bill would not authorize other relief, the prayer will not be amended.

2. It is a rule in equity, as well as at law, that parol evidence will not be received to explain or vary a will, or other written instrument, or to solve any patent ambiguity. But surrounding circumstances may be shown to explain what might seem an ambiguity on the face of a will.

3. A direction to invest twenty thousand dollars in some safe investment for a daughter, must be held to mean that sum *in money*, not in the stocks or securities in which the testator had invested the bulk of his estate, at their nominal value.

4. When a sum is directed to be invested for the benefit of a child of the testator, it must be invested at the end of a year from his death, and the child is entitled to the interest to accrue from the end of the year.

The bill in this cause was filed by the daughter of the testator, jointly with her husband, against the executors and others, for a construction of the will. The will directs the executors to place the sum of twenty thousand dollars of his estate at interest in some good and safe investment, for his said daughter. The testator, at the time of his death, owned a large amount of stock, paying large dividends, and was well acquainted with their character and value. The complainants insist that by the words twenty thousand dollars, the testator did not mean the dollars of currency, but dollars in stock, at its par value, and rely for this construction of the will, upon the fact of the large amount of stock owned by the testator, and that, when speaking of stocks, by the expression "one thousand dollars" in one or another particular kind of stock, he always meant that amount of stock at its par value, without regard to what the stock might be worth above par. They insist that the testator intended his executors to set aside the sum of \$20,000 from some of his investments, or take a proportionate share from each of them.

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The executors have filed their answer, denying any such intention upon the part of the testator, and insisting that \$20,000 means simply and only so many dollars in the currency of the country, and that such must be the investment.

Mr. Bradley, for complainants.

Mr. G. F. Tuttle, for defendants.

The words of the will as to Mrs. Halsted's interest in the personal estate, are as follows: "I direct my executors hereinafter named, the survivors and survivor of them, to place the sum of twenty thousand dollars of my estate at interest in some good and safe investment, and to pay the net income or interest thereof semi-annually to my said daughter, &c."

We insist that these words are to be taken in their plain and obvious sense. "The words of the will, free of conjecture, are the means at law and in equity to collect the testator's intention." *Ram on Wills* 51, and cases cited.

The complainants suggest a division of the stocks, and it may be suggested that the words, "of my estate," strengthen this view. These words can have no such effect. The investment must, of course, be made from and out of the testator's estate. There is no other fund for it, and these words are almost superfluous.

We submit that the will does not warrant the executors in dividing the stocks as suggested, and that the practice of the Court of Chancery requires that this sum should be invested either upon bond and mortgage, or in stocks of the United States, or of this state. *Dimes v. Scott*, 4 *Russ.* 195; *Howe v. Dartmouth*, 7 *Ves.* 137.

Many of these stocks are of corporations in other states, and therefore beyond the control of this court; they are liable to loss by competition, accidents, frauds, and in various other ways, and the executors would be powerless, as also this court, to preserve the fund safe and intact, if it be held by the court that the complainant's suggestion is correct. The children of the complainants are not parties to this suit,

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and would be free to prosecute the executors for any loss upon these stocks.

If the testator had meant to give to his executors stocks instead of money, for the benefit of Mrs. Halsted and her children, the proper and obvious course would have been to have given such stocks in express terms.

The testimony as to the verbal statements made by the testator shortly before and after the making of his will, is inadmissible. 1 *Jarman on Wills* 349 (marg. paging); *Boylan v. Meeker*, 4 *Dutcher* 274, 284, 285, 293; *Falkland v. Bertie*, 2 *Vern.* 333, referred to by Van Dyke, J., in *Boylan v. Meeker*, p. 308; *S. C.* 311, reference to 4 *Wash.* 262.

The admission of this testimony would allow the will to be altered or revoked by declarations of the testator, contrary to the requirements of the statute. *Nix. Dig.* 913, § 2. It should therefore be excluded.

The inventory of the estate is correctly made. Appraisement of stocks at par, intrinsically worth more, is incompatible with the oath of the appraisers required by the statute (*Nix. Dig.* 277, § 10), and with approved usage. *Norris v. Thomson's Ex'rs, Court of Appeals.*

The complainants claim that Mrs. Halsted is entitled to her income and interest, from testator's death.

We insist that, at the earliest, her income commences at the expiration of a year from his death; if, indeed, it is not postponed to the time of the final decree in this cause, inasmuch as the executors have been precluded from investing the sum of \$20,000 provided by the will for that purpose, by the complainants in this cause.

THE CHANCELLOR.

The bill in this cause is filed by Martha Adela Halsted, daughter of Samuel Meeker, deceased, jointly with her husband, Oliver S. Halsted, jun., against the executors of the will of her father, and the legatees in said will and the two codicils to it, for the purpose of having "such construction given to

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said will and codicils as will carry out the intention and meaning thereof, and the validity of said will, and that the legacies may be satisfied in such way as this court shall deem just and proper."

These are the words of the only prayer for relief in the bill; it does not contain the general prayer. The only matter, then, which can be considered in this suit, is the construction of the will and codicils as they stand. The capacity of the testator, or any mistake in drawing the will or any part of it, cannot be considered here.

An amendment to the prayer of the bill would not change the matter in this respect, for there are no facts alleged on which such relief could be founded. The will, therefore, in this suit, must, with the codicils, be taken to be a valid will, drawn according to the intentions of the testator. The only question is as to the construction of it.

It is a settled principle, both at law and in equity, that parol evidence should not be received to explain or vary any will or other written instrument. And this rule applies with peculiar force to any instrument which, like a will, is by statute required to be in writing.

Where there is any doubt on the face of a will, the court will regard the surrounding circumstances under which it was made, and by them solve that doubt. And where there is a latent ambiguity, not appearing on the face of the will, but which arises from evidence by parol, and outside of the will, it may be explained by parol evidence.

In this case, there is no ambiguity on the face of the will. It directs the executors "to place the sum of twenty thousand dollars of my estate at interest, in some good and safe investment." There is no ambiguity about the word "dollars." If any word has a settled meaning at law, and in the courts, it is this. It can only mean the legal currency of the United States, not dollars vested in bonds or stocks, either at the market or par value, or at the original cost to the testator. And, as if to render it sure, the direction is to *place* twenty thousand dollars; it implies change, not to let it remain. The

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expression is the "*sum of*," always applied to moneys, seldom or never to bonds, stocks, or other property, unless in adding up their money value; and the terms, "*in some*" good and safe investment, indicates an intention that the executors are to select. This direction is only to guide that selection.

The whole phraseology of the direction is inconsistent with the idea that he intended them to set aside the sum from any of his own investments, or to take a proportionate share from each of them.

The circumstances surrounding the testator and his property, relied upon to show that by the words twenty thousand dollars he did not mean the dollars of currency or of money value, are the facts that testator owned a large amount of stocks, was well acquainted with their character and value, and that he and others, when speaking of stocks, by the expression one thousand dollars in City Bank stock, or New York Central stock, meant that amount of stock at its par value, though one was worth fifty per cent. and the other thirty per cent. above par.

Take these facts as proved. No one can suppose from them that the testator, when using the term "dollars" to designate the amount of money he intended to give or offer, meant dollars in any specific stock. Had he agreed to purchase a house and lot for ten thousand dollars, no court would, from such proof, have held him bound to pay the Newark gas light stock or Ashtabula railroad stock, at par, when one was worth one hundred and forty, and the other two hundred per cent. And he cannot be held to mean this in his will when he gives a legacy of twenty thousand dollars.

The amount to be invested by the executors, must be twenty thousand dollars in legal money of the United States. It must be considered as having been invested at the end of one year from the death of the testator, from which time the complainants are entitled to interest on it. The executors are at liberty to invest the same on mortgage, and in bonds of this state, and of the United States.

The taxable costs, on both sides, including the cost of

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printing the evidence, must be paid out of the estate. It is not a proper case for the allowance of a counsel fee to the complainants.

HOLMES vs. HOLMES.

1. Upon exceptions to a master's report on a question of fact, the court will come to a conclusion upon the evidence, irrespective of the master's opinion. The report is not entitled to the same weight as the verdict of a jury, upon a motion for a new trial in a court of law.

2. The report of a master upon a question of fact will not be overruled, although the evidence on which it is founded is vague, and not altogether satisfactory, if it does not appear that his conclusion was unwarranted by the evidence.

This matter came up on exceptions by the complainants, to the report of the master, made upon an interlocutory decree heretofore taken in the cause.

Mr. S. A. Allen, for exceptants.

Mr. Browning, for defendant.

THE CHANCELLOR.

The bill in this case was filed by the complainants, Sarah C. Holmes and her three daughters, against her son, John Holmes, for an account. The account asked was chiefly for the proceeds of the sale of wood and timber standing on lands of which Josiah Holmes, the husband of Sarah, and the father of John, died seized, and for the rent of those lands. Josiah Holmes died on the 26th of July, 1861, intestate.

The principal matters in controversy were settled by an interlocutory decree, made on the 24th of May, 1865, by agreement between the parties at the argument of the cause, on suggestion of the Chancellor.

That decree directed a reference to a master to state the

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accounts between the parties, and settled to a great extent, the principles on which they were to be stated.

To the report of the master the complainants excepted, and the cause is before me on the hearing of those exceptions.

Only two of the exceptions, the first and third, were seriously urged upon the argument, and I have no hesitation in overruling all the others.

The order of reference directed the master to charge the defendant, as rent for the house and farm occupied by him, four hundred dollars per annum, for the three years ending on the 25th days of March, 1862, 1863, and 1864, respectively, and five hundred dollars for the year ending on that day, in 1865. But he was directed to ascertain and report whether these rents, assumed to have been agreed upon between the parties for those years, were understood and intended by them to be the whole rental value of the farm, or the rent for the estates of the complainants therein. The master reports that it was for the whole rental value, to which complainants except.

Josiah Holmes left five children; three daughters, Elizabeth, Anna, and Louisa, who are complainants; and two sons, the defendant, and Josiah R. Holmes.

Josiah, the son, on the 14th of May, 1863, conveyed his one fifth of the estate of his father to the defendant, his mother having first released to him her dower therein, for an annuity secured to her.

Between parties so situated, it is evident that this exception depends upon a question of facts only.

Did the master arrive at a correct conclusion from the evidence? To determine this, it is necessary to review and weigh the evidence. For this reason the master's report is entitled to no special consideration beyond the soundness of his reasoning, and the advantage of seeing the demeanor of the witnesses while examined, which is of importance in judging of their credibility, when they contradict each other. But the report has not the position of a verdict, on a motion for

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a new trial in courts of law. That will not be set aside merely because the court would have come to a different conclusion from the evidence.

The testimony on this point is painfully conflicting, and the master reports that, upon the conflicting testimony, and the restraining character of the order, he had difficulty in determining it to his satisfaction. I have felt the same difficulty, but upon mature consideration, have arrived at a result entirely satisfactory to me, but different from that reached by the master.

In the first place, the number of the witnesses who swear that the sums fixed were to be the rents of the complainants' estate in the property, is greater than that of the witnesses who swear that it was for the whole. The four complainants and Josiah R. Holmes, all testify to that understanding as to the time, after the first year. Josiah expressly swears to it. They are contradicted by John, the defendant, and also, seemingly, by Crawley, the surveyor, as to the rent for the last year.

The three daughters and the defendant are alike interested. Their testimony is legal, and must be received with due regard to their interest. The testimony of the daughters is somewhat affected by positive discrepancies between their two examinations, and by omissions in the first supplied in the last.

The testimony of John is affected by the fact that he is contradicted uniformly by all the complainants, and by Josiah, as to the fact whether there was any agreement at all to pay rent in 1862; a fact settled against him by the interlocutory decree.

The testimony of Sarah and Josiah is not affected by interest. And all agree that for 1862 the agreement was, that the rent of four hundred dollars was for the complainants' estate only. Crawley's evidence is confined to the last year, for which a lease was drawn by him. This would not affect the preceding two years, except that there is a great probability that the understanding for all three years was the same on this point.

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But Crawley's testimony is not clear or positive. He drew the lease mainly from John's dictation ; and he says, in general terms the understanding was as he relates, but he does not say from whom he derived that understanding, or that any thing was said about it, by or in the presence of any of the complainants. He may have had that understanding and not recollect, as he surely does not tell, from whom he got it. He is evidently mistaken as to the main part of the lease being filled up in the presence, and at the dictation of Mrs. Holmes.

The color of the ink plainly shows that the whole was filled up with dark ink, except the signatures and two interlineations, written in pale ink. The first interlineation, which is a significant one, provides that John should pay for two-fifths of the seed ; the second that he should make certain repairs. As Crawley may have got his understanding from John, his testimony as to it can have but little weight.

But the interlineation as to the seed must have weight. If John was to receive his share of the rent, like his sisters, the "landlord" should have paid John's share of the seed out of the rent which was to be paid to her for him and them. And he should not have been required to pay a second time for two-fifths of the seed.

But if the rent was for the three-fifths owned by his sisters, then they should pay out of it that proportion of the seed, and he for the other two-fifths, it being for the benefit of their estates in that proportion.

The fact that this change was made by interlineation in the lease, upon discussion, is strong evidence in favor of the complainants on this point. The other interlineation is a provision against John, no doubt inserted at the instance of the complainants, or some of them.

Again, the widow was in possession of the farm by right of quarantine. No one else was entitled to rent it, and all parties so understood. She acted for herself and her daughters, who had no other livelihood. She bargained with an active son, of mature age, able to take care of himself, and settled,

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on consultation with her daughters, what sum was to be paid for the farm, in a bargain by which he was to have everything raised on it. In this situation, it is not probable that he would agree to pay to his mother a rent, of which two-fifths, or any other share, was to be repaid to him; he would bargain to pay just the sum that they were to receive and retain. And if otherwise, pains would have been taken to have it understood that he was not to pay the whole sum stipulated, in a way that could not have been forgotten by any one.

But these reasons do not apply to the rent for the first year. The agreement for that year, was with his father for the rent of the whole farm. As regards the rent for the second, third, and fourth years, I consider the first exception well taken. The account must be referred back to the master to be re-stated, on the assumption that the rent for three years was for the estates of the complainants only.

As to the item of one hundred dollars, received by the defendant for goods sold by him, which is the basis of the third exception, the testimony is vague and contradictory; and as I cannot arrive at any satisfactory conclusion different from that of the report, I shall overrule the exception.

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1. A defendant, in his cross-bill, cannot set up a case inconsistent with the case made in his answer to the original bill.

2. Where a sale of stock of a corporation was made in consideration, in part, of a promise that the corporation would not set up any claim against the vendor of such stock, on account of past transactions, and in violation of such stipulation, the company brought a suit, it was held that such stipulation was not a condition on which the title of the stock depended, and that, consequently, the title to such stock did not revert in the vendor.

3. The principal stockholders of a solvent company having agreed, for a consideration, that they would not claim anything on certain old accounts against a former officer of the company, it was intimated that a suit,

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making such claim in the name of the company, might, in equity, be considered a breach of such agreement, so far as the avails of such suit would go to the benefit of such stockholders.

This cause was argued upon a motion to dissolve the injunction. The facts of the case fully appear in the opinion of the master.

Mr. Williamson and *Mr. Browning*, in support of the motion.

Mr. Woodruff, (with whom was *Mr. Bradley*,) contra.

THE CHIEF JUSTICE, sitting as master.

The original bill in this cause was filed on the 21st of February, 1865, by Oliver D. F. Grant, against John Hopper and the above named defendant, James Jackson. Its object was to compel the specific performance of a contract between said James Jackson and said Grant, entered into on the 27th of August, 1864, for the sale, by the former to the latter, of certain shares of the capital stock of "The New Jersey Locomotive Company," which were alleged to have a fictitious value to the purchaser. The number of these shares thus alleged to have been sold, was twelve hundred and fifty, including in this number, however, three hundred shares standing in the name of John Hopper, who held them as the trustee of Mr. Jackson's wife, the clause in the bill being, with regard to them, that the defendant, Jackson, at the time of the sale, had agreed to "do all that he could to have the said John Hopper transfer the said shares" to the complainant. The price of the stock agreed upon, is stated to have been one hundred dollars a share. The bill then alleges that nine hundred and forty-five shares of those thus sold, were transferred to the complainant, and were duly paid for by him; that the three hundred shares, standing in the name of Mr. Hopper, were under the control of Mr. Jackson, and that he could, by requesting it, have obtained their

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transfer ; but that he had wrongfully neglected to do so, and that neither that portion of the shares so purchased, nor the remaining five shares, had been assigned to the complainant. The prayer of the bill is that the contract of sale, in these respects, should be decreed to be specifically performed.

This bill has been answered by both of the defendants. In this answer, Mr. Jackson admits the sale of nine hundred and fifty shares of the stock in question, at the time stated, but he denies that he sold the three hundred shares, the legal title to which was vested in Mr. Hopper. With regard to them, his averment is that he promised, if he ever got them, he would sell them to the complainant ; but he denies that he stipulated to part with them at any definite price. It also appears from the original bill, and this answer, that the sale referred to above, was effected through the agency of one Samuel Smith, and that Aaron S. Pennington, esq., as the counsel of Mr. Jackson, was present, and assisted in making the contract, which was by parol ; and that a few days thereafter, Mr. Pennington drew up, in writing, a memorandum of the transaction, and of the contract, which was signed by himself and Mr. Samuel Smith. This memorandum is set out at length in the answer now analyzed ; and from this it appears that there were certain terms of the contract for the sale of the stock in question which were not set out in the original bill, and which will be alluded to in the sequel. The answer then sets up certain matters in excuse, on the part of Mr. Jackson, for his failure to transfer the remaining five shares of the stock admitted to have been sold, and proffers himself ready to comply with his contract in this particular.

A replication having been put in, witnesses were examined on both sides, and a rule taken, on the part of the defendants, to close testimony, which expired on the 8th of March, 1866.

At this stage of the proceedings, on the 12th of March, four days after the time limited in the rule to close testimony had elapsed, the defendant, Mr. Jackson, presented his petition to the Chancellor for leave to file a cross-bill in the

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cause. The substantial grounds of this application were two-fold, viz.: first, that the sale before mentioned, of the nine hundred and fifty shares of stock, was made upon the express condition, in the language of the petition, "that the said Oliver D. F. Grant, David Beach Grant, and Benjamin Salter, would not, and that said company would not, claim anything of your petitioner on account of any claims or accounts which said company pretended to have against him, and that they would not bring any suit against him on account thereof." In this connection the petitioner avers the breach of this condition, and declares that on the 17th of December, 1864, the "said Oliver D. F. Grant, Benjamin Salter, and David B. Grant, caused to be filed in the name of said company, in this court, a bill against your petitioner, claiming over a hundred thousand dollars on account of said claims, in direct violation of said conditions, and on February 7th, 1865, filed an amended bill in the same cause, claiming a still larger amount on account thereof, the said Oliver D. F. Grant personally attending the prosecution thereof, on the examination of witnesses in the case." The second ground on which the petition is based, is an alleged fraud on the part of Mr. Oliver D. F. Grant, in procuring from the petitioner the sale and transfer of the nine hundred and forty-five shares of the stock above mentioned. Specifications of these fraudulent acts are set forth in the petition, which it is unnecessary to notice.

On the 14th of March, 1866, the Chancellor granted the defendant leave to file a cross-bill, pursuant to the prayer of said petition, and accordingly, on the 31st of the same month, a bill of that description, which gives rise to the questions to be decided by me at this time, was duly exhibited by Mr. Jackson in this court. It is sufficient for my present aims, to say that the substance of that bill consists in a re-statement of the facts before alluded to, contained in the petition, viz.: the fraud in procuring the contract of sale, and the specified conditions of that contract, and their violation. As the

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legal result of this condition of affairs, it is claimed that the contract being annulled by the fraud, or by the breach of the conditions, the complainant has a right to a return of the nine hundred and forty-five shares of stock heretofore transferred by him to the defendant, upon the repayment of the consideration received for them, which he tenders himself ready to make. The general prayer of the bill is to that end. It also appears from this bill, that just previous to its being filed, a notice was given of a meeting of the stockholders of the New Jersey Locomotive and Machine Company, for the purpose of taking into consideration the propriety of dissolving the corporation. The charter of the company authorizes this step to be taken "at a meeting of the stockholders specially convened for that purpose ; provided that at least three fourths, in amount or value, of the stockholders shall be present or represented therein." The bill alleges that the defendant, Mr. Oliver D. F. Grant, designs to make use of the nine hundred and forty-five shares of stock in dispute, for the purpose of occasioning the dissolution of the company ; and an injunction is asked to prohibit such use, or the transfer of such stock, during the pendency of this suit. An injunction having been allowed, agreeably to this prayer, the motion now before me is to order its dissolution.

Upon the argument, a question was raised which, as I do not think at this stage of the cause it can be properly decided by me, I will dispose of before proceeding to the merits of the case. It was insisted by the counsel of the defendant, and by defendant, I mean Mr. Oliver D. F. Grant, who occupies that position in this cross-bill, that by the well settled rules of practice, if not by the fundamental principles which regulate proceedings in courts of equity, a complainant in a cross-bill cannot make or set up a case different from, and certainly not one inconsistent with, the substantial defence contained in his answer to the original bill ; and it was said that the cross-bill now under consideration violates, in the clearest manner, this important maxim. That the general principle thus asserted exists, and that it is necessarily inhe-

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rent in the rule which requires from a defendant a full and conscientious disclosure of his entire defence in his answer, and is therefore of considerable moment, cannot be denied. In a proper case, when free to act, I should be inclined to enforce the rule with inflexibility. If the defence appearing in an answer, be defective by reason of excusable mistake, such answer should be amended so as to correspond, in its material statements, with the contemplated cross-bill. It certainly seems difficult to understand how, without a wide departure from the orderly conduct of a cause in a Court of Chancery, a case is to be finally disposed of, which raises one issue on the original bill, and an entirely different and irreconcilable issue on the cross-bill. And this appears to me, as at present advised, to be the aspect of the case now before me.

The issues on the original bill and answer are two, viz.: first, whether the defendant therein agreed to endeavor to procure the transfer of the three hundred shares of stock held by Mr. Hopper; and second, whether he sufficiently excuses himself for not having transferred the other five shares which the bill demands. These are the only questions to be decided on this original bill and the answer to it. The issues raised on the cross-bill are also two, viz.: first, whether the entire contract of sale was not procured from Mr. Jackson by fraud; and second, whether such sale, if fairly made, was not defeasible on the non-performance of a condition subsequent. The points for adjudication therefore, appearing on the face of these successive pleadings, are evidently not the same in substance or effect, and it may, perhaps, be claimed that these statements of defence are so opposite and antagonistic that they cannot be permitted to stand together in the same cause, and that, as the original answer cannot be dispensed with, the cross-bill must eventually fall. But this question, as to the propriety of permitting this new defence to be interposed in this manner, I do not feel authorized, on this reference, to decide. The point has already been passed upon by the Chancellor, and I do not conceive that, upon the present motion, I have the power to review that decision. When the com-

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plainant presented his petition, the precise point to be settled was, whether these facts, variant from the facts in the answer, might be exhibited in court in the form of a cross-bill. Such permission was given, and I should not feel justified in dismissing the injunction on the ground that such order was, as a matter of correct practice, erroneous. I shall therefore decide the motion on the merits of the case as disclosed by the cross-bill, the answer to it, and the proofs.

It is obvious, upon the surface of the case, that the continuance of the injunction must depend on the right of the complainant to require a re-transfer of the nine hundred and forty-five shares of stock in question. As has been already above stated, this right to a return of this stock is vested in the cross-bill on two grounds, viz.: first, the fraud of the defendant in procuring from the complainant the sale and transfer of the shares; and second, the existence in such contract of a condition subsequent, which has been infringed.

The first of these points I shall dismiss without any discussion, and with the remark that I cannot discover anything whatever in the pleadings or proofs which appears to justify so serious a charge. It seems to have originated at a late period of the controversy, in suspicions of the complainant, arising from trivial circumstances, or from facts in part misunderstood. Indeed, the point was not deemed of sufficient consequence to form a topic for argument by the senior counsel of the complainant, and I therefore pass it without further comment.

The motion, consequently, must be decided, if the decision is to be in favor of the complainant, on the second ground. Let us examine the position in this respect, taken in the cross-bill.

The complainant asserts that he made the sale of his stock on the *condition* that neither the *New Jersey Locomotive and Machine Company*, nor the said Oliver D. F. Grant, David Beach Grant, nor Benjamin Salter, personally, as individuals and as stockholders in said company, would ever claim anything of him on account of any claims between him and the

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said company. As an exhibition of a direct violation of this condition, as he denominates it, he shows that the company, after such agreement, filed a bill against him for claims embraced in such condition. It appears from the pleadings, that a certain account of the complainant against the company, exceeding in amount one hundred thousand dollars, had, prior to the date of the contract in controversy, been approved of and passed by the board of directors; but that the defendant had called in question the fairness of that transaction, and had threatened an investigation. If, therefore, in consideration of the sale of his stock, the complainant was promised by the company that his past transactions with it should not be disturbed, but should be allowed to sleep, it was certainly a most important feature of the contract. The first inquiry therefore is, was such a stipulation part of the contract of sale?

I have not the least doubt on this subject. It appears in the case, to my entire satisfaction, that no such promise as this was ever made to the complainant. Reading the transaction in the light of evidence which it seems to me cannot be disputed, it is difficult to see how the complainant had persuaded himself that the stipulation in question was incorporated in his contract. The evidence on this head presents these conclusive facts. The contract was by parol; but, a few days after it was made, a written memorandum of the agreement, with the knowledge of the complainant, was drawn up by his own counsel. That writing, thus framed, was signed by Mr. Pennington, the counsel, and by Mr. Samuel Smith, the admitted agent of the complainant in making the sale, and in this condition was shown by Mr. Pennington to the complainant. Mr Pennington has been examined as a witness, and he deposes that the statements of this memorandum are true. This writing, thus authenticated, being signed by the counsel and agent of the complainant, and unchallenged by him at the time in any particular, must, as an instrument of evidence, be considered as entitled to very great weight. Indeed it seems to fall little short, considered in its effects, of a

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contract signed by the party to be charged. Now, if we are to resort to this memorandum as the depository of the parties' intentions, the contention of the defendant must be at once exploded. The memorandum is express upon this point. It states that Mr. Jackson instructed Mr. Smith, his agent, to make a demand that the company would release all claims for the past. And what occurred on the presentation of this demand, is recorded in these words: "We met, and the party objected that the company could not give any such release. Samuel Smith and A. S. Pennington then went to see Jackson, and he agreed that if O. D. F. Grant, D. B. Grant, and B. Salter, would *personally agree that as stockholders* they did not mean to claim anything from him on those old accounts, and so far as they were concerned, they would not, that then he could proceed with the purchase. This we reported, and they severally made the promise." Here then we find in this writing of the highest authenticity, and which was made almost coterminously with the transaction which it purports to record, that this identical proposition of a release of these claims against the complainant, on the part of the company, was proposed and rejected, and that in lieu thereof, the complainant consented to take the individual stipulations of the stockholders. Nor does the testimony on this head end here. It is clearly in evidence that, until about the time of filing the cross-bill, the complainant himself never pretended that the condition now claimed was embraced in this contract. This is signally evidenced. Thus, in his answer to the suit brought by the company against him, instead of setting up that this company had agreed not to make this claim against him, we find him stating the agreement precisely as it is set forth in Mr. Pennington's memorandum. The language of this answer, which is put in under oath, is as follows: "That the said Oliver D. F. Grant, David Beach Grant, and Benjamin Salter afterwards, and as an inducement to this defendant to sell his stock at one hundred dollars per share, *did personally agree that as stockholders they did not* mean to claim anything from him on the old accounts

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of the said company against him, and would not." But there is no pretence whatever in this answer, that the company ever made such a stipulation. And I think the statement in the complainant's answer to the original bill in this case now before me, is equally clear and emphatic to the same purpose, for the answer copies the memorandum at length, and although it denies that the complainant authorized a sale of the stock, the title to which was placed in Mr. Hopper, it does not allege that in any other respects the memorandum is not correct. It was suggested on the argument, that in the other parts of this answer it is said the stock was sold on conditions, and that the conditions referred to do not appear in the answer. But this is not the natural or true construction of the allusive terms thus used; the conditions to which they relate are evidently the stipulations contained in the memorandum of Mr. Pennington. Under these circumstances, I think it appears to demonstration in the case, that there was never any such agreement as that set up by the complainant in his cross-bill in regard to the particulars under consideration. My conclusion from the proofs now before me is, that it was no part of the agreement, that the company would not proceed by suit or otherwise against the complainant with regard to any matters whatever.

The question therefore then arises, whether the suit which the company has brought against the complainant, is a violation of any part of the agreement between the complainant and the defendant. It is obvious that a suit of a certain character could have been brought by the company against the complainant, which, with regard to this contract, would appear to be entirely unobjectionable. The precise agreement, as extracted from the memorandum of Mr. Pennington, was, it will be remembered, that Oliver D. F. Grant, D. B. Grant, and Benjamin Salter, personally agree that as stockholders they did not mean to claim anything on the old accounts, and so far as they were concerned they would not; and I think, therefore, it is clear that if the company were insolvent, so that any moneys which might be recovered

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on its old accounts against the complainant, would go to its creditors, and would not enure to the benefit of its stockholders, a suit in behalf of the corporation against the complainant for such a purpose, would not be an infringement of the agreement above set forth. From the results of such a suit, the defendant, as a stockholder, would derive no benefit. But when the company is in a prosperous condition, the result of a suit would be far different. The proceeds of such a suit would then go to increase the value of the stock; and under such conditions, the stockholders would be the only parties to be benefited by the proceedings. To say the least of it, it might be contended with considerable force, that a suit brought in the name of the company, against the complainant, by the stockholders, at a time when the entire avails of such suit would pass into the surplus earnings of the company, is for all practical purposes a claim made by such stockholders, and is thus, in substance, a breach of that stipulation in their contract, not to make such claim. But this point was not discussed on the argument, and as its consideration will enter necessarily into the decision of the controversy now pending between the complainant and the company, and as it seems to me the present case can be disposed of on another ground which is free from all difficulty, I shall not decide this question, but will assume, for present purposes, that the institution of such suit, in the manner set forth in the cross-bill, was an infringement of the stipulation to which the foregoing remarks have been applied.

This last assumption, it will be perceived, leaves remaining but a single inquiry: what is the legal character of the stipulation thus, for the purposes of the argument, admitted to have been broken? Is it a *condition* in the legal sense of the term? If it be such, it became annexed to the title to the stock, and when the act was done in violation of it, defeated that title. It is only upon the ground of the existence of a strict legal condition of this character, that the complainant can base his demand of a reconveyance of the shares

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of stock in question. This inquiry presents simply a question of intention. Did the contracting parties mean that if, at any future time, the defendant and his associate stockholders, or any of them, made any claim on the old accounts of the corporation against the complainant, his title to the stock which he purchased should be defeated? Such a stipulation is so unusual in sales of personal property, that all natural implications would be against the construction which would adopt it. It should be received only from the presence of language which will admit of no other rational signification. But upon any rules of construction, however lax, I do not find any ground, in the present case, upon which to found a pretence that this sale was upon a condition subsequent. It is true that the complainant, in his cross-bill, alleges the existence of such a condition; but in his answer to the company's bill, and in his answer to the bill in this cause, his statements, in the clearest manner, show that the contract was possessed of no such feature. What the parties or witnesses now choose to designate the stipulation in question is of no importance; what the parties said and did when forming the contract are the only guides to a correct construction.

Looking then to the language employed at the time of the transaction, it seems to me impossible for any person to have a doubt upon the subject. The statement of Mr. Pennington, both in his memorandum and in his evidence, and which statement on this point is not in the least contradicted, or in any wise impeached, is most explicit, and is to the effect that the complainant agreed "that if O. D. F. Grant, D. B. Grant, and Benjamin Salter would *personally agree* that as stockholders they did not mean to claim," &c. Now it is clear that it was the *agreement* on the part of the stockholders, and not the performance of that agreement, which formed the consideration of the sale, just as much so as, on a sale of a chattel on a credit, the promise to pay in the future forms the consideration on which the vender parts with his property. The principle which would characterize this agreement on the part of the stockholders as a condition subse-

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quent, running with and defeating, upon its breach, the title to the stock now in controversy, would, in all contracts of sale of chattels, convert every promise to do, or not to do, some future act, into a condition, upon which the ownership of the articles sold would be made to depend. Such a doctrine is countenanced by no authority, and is opposed to all the well settled rules of law which belong to this subject. I am satisfied that the stipulation in the contract in question was not a condition, and therefore its violation does not affect the title of the defendant to the shares of stock which have been transferred to him. This being the result of my consideration of the case, I shall advise his honor the Chancellor to dissolve the injunction with costs.

I may add that, at one stage of my consideration of the matters involved in this discussion, I had some doubt whether the defendant, by prosecuting the suit in the name of the company against the complainant, and justifying such act on the ground that, since entering into the agreement not to prosecute as a stockholder, he had discovered sundry frauds which the complainant had perpetrated towards the company, and which were unknown to him at the time he so bound himself, was not such an abandonment of the contract on his part that the complainant had the right to consider it a rescision of it. It is not very readily to be perceived how the defendant can refuse to perform, on the ground of fraud in the other contracting party, acts on his part which constitute a portion of the consideration of the stock which he holds, without, at the same time, revoking, on the same ground, the entire contract. I am not aware of any principle on which a party can be permitted, for alleged fraud, to rescind such part of a contract as is a burthen to him, and to retain the residue which is beneficial. And if the complainant, upon the inception of the proceedings in this court by the company against him, had treated such act as a rescision of the entire contract by the defendant, I confess such a position of the case would have presented a problem which I should have considered worthy of a careful examination. But the complainant did not

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see fit to treat the contract as rescinded by the defendant; on the contrary, he interposed it as a defence in the suit of the company, and at that time appears to have been willing to consider it annulled, only in the event of its failing him as a protection against that proceeding. So in his answer to the bill in the present case, he has dealt with it as a subsisting contract. And in that light, under these circumstances, I feel constrained to regard it.

In conclusion, I may remark that, since the argument, I have read over all the pleadings and proofs belonging to this case, and that I have carefully considered all the points raised by counsel.

KINSELA'S ADMINISTRATOR vs. THE CATARACT CITY BANK.

Where "seven (or more) citizens of this state" associated to establish an office of discount, deposit, and circulation, under the act to authorize the business of banking, approved February 27th, 1850, and executed, acknowledged, and had recorded in the offices of the secretary of state, and the clerk of the county where said office was proposed to be located, the certificate required by the sixteenth section of the act, which certificate also states that the associates had elected one of their number to be president of the association, and the association went into operation without further organization, except the selection of a cashier, it was *held*—

1. That the persons signing said certificate were only associates, and corporators or stockholders, and not directors or managers of said corporation; the eighteenth section giving to them only power "to choose a board of directors," under whose "direction" the business of banking may be conducted.

2. That the transaction of banking business by said associates, or by the president alone, whom they had selected, was a fraud on the statute.

3. Where seven of the associates subscribed for only five shares each, and the balance of the three thousand shares was subscribed for by the eighth associate, who was also the president elect, and one third on each share of the whole stock was paid in by the president, the other associates paying nothing, it was held to be a valid corporation, and each and all the associates responsible for its proceedings.

4. That each of said associates was liable, in case of insolvency, to pay the deficiency on the stock standing in his name, not exceeding the amount of each share as fixed by the charter, or such proportion as shall be re-

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quired to satisfy the debts of the company, and that a court of equity will enforce such payment.

5. Under the second section of the act to prevent frauds by incorporated companies, approved April 15th, 1846, it was held, in order to evade a sale or transfer by an insolvent corporation or its officers, it must appear that the corporation had, previously to such sale or transfer, become insolvent, or suspended its ordinary business for want of funds.

6. Under the proviso to said section, a transfer of notes or property of the bank, prior to suspension, for a valuable consideration, to a *bona fide* purchaser, without "knowledge, information, or notice of the insolvency," was held to be good and valid.

7. The "knowledge, information, and notice of the insolvency" cannot depend on mere constructive notice, or what will put the party on inquiry only. The terms of the act imply knowledge, either of the party himself or imparted to him by some one who had that knowledge, and not mere suspicion, supposition, or belief of himself or of another, imparted to him.

8. An associate who took no part in the transactions of the bank after he had signed the certificate, was not in a situation to be charged with implied knowledge or notice as a director or manager.

9. Where a sum of money was placed in the bank as a special deposit to meet a contingency of the bank which never happened, the repayment of the same by the receiver was held valid.

10. The removal of the receiver was refused.

11. Several payments were made by the bank, but whether before or after suspension, did not clearly appear; in these cases the receiver was directed to deal with them in accordance with the principles stated in the opinion.

This cause was argued before the Hon. J. F. Randolph, master, sitting for the Chancellor, upon exceptions by certain creditors of the Cataract City Bank, to the report of the receiver. The facts of the case fully appear in the opinion of the master.

Mr. Woodruff, for the creditors, excepted to the report upon the following grounds:

1. That the receiver's account is not sworn to. *Edwards on Rec.* 616, 632; 1 *Smith's Ch. Pr.* 643.

2. That it is not brought down to the time of accounting. *Edwards on Rec.* 615, 616, 617.

3. That the safe and articles undisposed of, are not men-

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tioned. The receiver's account should show the state of affairs; what is on hand in property, as well as in cash. *Edwards on Rec.* 615 to 622, inclusive.

4. That the receiver has not charged himself with the amount of his own subscription to the stock—five shares, at \$50—\$250.

This he was bound to do. His excuse for not doing so, that Sanford and he, when he subscribed, agreed that he should never be called on to pay, is no legal excuse. Such an agreement was a fraud, and might be evidence of a conspiracy to defraud.

5. That he has not charged himself with \$7005, got by him on December 1st, 1860, at seven o'clock in the morning, the very day the bank failed. He is justly chargeable with this. He admits, in his answer, that the bank was insolvent on November 23d, 1860, and that, on November 24th, 1860, the Mechanics and Traders Bank refused to trust it for \$3000.

He admits Sanford offered to *secure* him for his then balance if *he* would lend the bank \$3000; that before December 1st, he called three times for collaterals, thus admitting his knowledge that the bank was insolvent; and that, on December 1st, he appropriated the assets, which should have been distributed among the creditors ratably, to his own private benefit, contrary to the statute. *Nix. Dig.* 371, § 2.

His answer, together with his bank book, show that his pretence of good faith is a subterfuge; the items under date of November 23d, 1860, not having been put in his bank book until December 1st, 1860.

The evidence shows that Rafferty knew this bank was insolvent before he got this \$7005, and that he got it *because* he knew it was insolvent. This amount should be returned by him for the equal benefit of all the creditors. Mr. Rafferty being one of the original stockholders and managers of this bank, could not, by law, after he knew it was insolvent, appropriate \$7005, in notes, &c., to his own use. It was not a transaction "in the ordinary course of business." It was at an unusual hour, seven o'clock in the morning, and in an

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unusual manner, not by going in at the front door, but, as he confesses in his answer, by "a side door."

What right has he, after getting the deposits of the industrious mechanic, the orphan, and the widow, to put them thus in his own pocket, so that they shall lose, and he shall not lose?

The evidence shows that Rafferty got these bills receivable, \$7005 worth, after the bank was insolvent, and after he *knew* it to be insolvent. They were got stealthily, under circumstances showing conscious guilt. His subsequent acts at A. A. Hopper's, on Sunday night, at Sanford's, on Monday night, and getting appointed receiver, were but adroit efforts to conceal the ill-gotten plunder, and cover up his tracks.

6. The receiver ought to be removed.

A receiver should be an indifferent person. He was not, and is not, such a person. He is interested in keeping over \$7000 from the creditors. He is really *a party* in interest. Such a one should not be appointed. *Edwards on Rec.* 2, 4; *Nix. Dig.* 373, § 12.

The receiver's powers are ample to investigate and collect. *Nix. Dig.* 273, § 9. And yet Mr. Rafferty, after having been a receiver three years, has not even collected one dollar from the original stockholders and starters of this bank, of whom he was one.

He is bound to report every six months. *Nix. Dig.* 373, § 11. Yet he has made no report. Why? Because he was afraid to make a true report of the \$7005 he obtained after he knew the bank was insolvent.

The act (*Nix. Dig.* 371, § 1 and 2,) declares that neither the president, nor any one else, could legally transfer any property after it was insolvent, except for "*a bona fide purchase, made for a valuable consideration,*" before the bank suspended, by a person "having no knowledge, information, or *notice* of the insolvency of said company, or of the sale being made in *contemplation* of insolvency of the said company."

This principle applies even as to partners at common law.

A precedent debt is not such a valuable consideration as

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the statute contemplates. 41 *Barb. S. C. R.* 307; 3 *Amer. Law Reg.*, (new series,) 637; 1 *Parsons on Con.* 216, and note j.

The persons subscribing the stock were the "managers" of the Cataract City Bank. Rafferty was one of these. They were the persons incorporated. *Nix. Dig.* 56, § 17. They were the only directors. No others were ever elected. Sanford was their "agent," under the name of president. His act was their act. What he knew they are presumed to know.

The association thus incorporated are subject to all liabilities mentioned in the "act concerning corporations." *Nix. Dig.* 59, § 41. By this act each stockholder is bound to pay up the whole amount of his stock. *Nix. Dig.* 151, § 5.

A stockholder is presumed to have notice of what is entered on the books of the corporation, to which he has access if he chooses.

Rafferty having taken this \$7005 when, by the books, it appeared the bank was insolvent, and when he knew it was so, should be decreed to hold it in trust for all the creditors. *Le Neve v. Le Neve*, 2 *White and Tudor's L. C.* 130, 132-3, 144, 149; 4 *Wheaton* 466.

The court has power to remove a receiver who has thus neglected and violated his plain duty, and ought to do so, and compel him to disgorge. *Edwards on Rec.* 4, 660, 667, 668; *Ibid.* 612, 625, 626.

Mr. Bradley, for receiver.

THE MASTER.

The bill in this case was filed in December, 1860, against the Cataract City Bank of Paterson, by one of its creditors, alleging the insolvency of the bank and its inability to redeem its notes or pay its debt, and praying for an injunction to restrain the bank, its officers and agents, from transferring or disposing of their property, real and personal, and from receiving debts due to, or paying debts due from, the bank, and also for the appointment of a receiver. The injunction

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was ordered, according to the prayer of the bill, and Philip Rafferty was appointed receiver, and qualified, by oath taken before a master, faithfully, honestly, and impartially to execute the powers and trusts reposed in him as receiver, for the creditors and stockholders of the Cataract Bank, without favor or affection.

On the 24th of January, 1861, the receiver filed an inventory of "all the estate, property, and effects of the bank in this state," and "an account of all debts due from said bank and to said bank," as near as the receiver could then ascertain; by which report it appears there was due the bank \$112,673.15; of which \$93,508.80 were considered "bad," \$16,792.43 "very doubtful," \$501.81 "doubtful," and \$1869.11 "good," and the "liabilities" of the bank were specified and set down at \$34,311.54.

On December 16th, 1861, the receiver made and filed his first report, and on the 10th of March, 1864, he made a further report; prior to which last report, viz., February 9th, 1864, Cornelius Van Winkle and other creditors of the bank filed a petition in this court, alleging various errors in the proceeding and accounts of the receiver, and praying for his discharge, and the appointment of another receiver, to which petition there was also filed an answer by the receiver, and a replication by the petitioner was also filed on the 6th of April, 1864. The whole matter contained in the report, petition, answer, and replication, was referred to a master, to state the accounts of the receiver for all moneys and assets which have come to his hand, and which in equity belong to the Cataract City Bank, and are due and payable to the creditors thereof; and that the master inquire and report whether the receiver is justly chargeable with the sum of \$7005.40, or any sum for money or assets of the bank received by him about the first of December, 1860; and whether he is chargeable with any sum for stock subscribed to the bank; and that the master inquire and report on the other matters set forth in the aforesaid petition, which may seem material.

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The master to whom the matter was referred reported the account of the receiver, showing the sum of \$2081.55 as the amount of money received by him from the assets of the bank, and the sum of \$833.24 as the amount of money paid out and expended by him, leaving a cash balance in the receiver's hands, of \$1248.26. The master also reported the evidence taken by him, for the consideration of the court, without giving an opinion upon any of the questions referred.

To this report of the master, as well as that of the receiver, exceptions were filed. A decree *pro confesso* having been previously taken against the defendants in the bill, the cause was set down for hearing on the petition and answer, the reports of the receiver and master, and exceptions thereto; and the same was argued before the late Chancellor, who failing to determine the cause while in office, and the present Chancellor having been of counsel in the cause, a rehearing was ordered before the master, and counsel both for the petitioner and the receiver having been heard, I will proceed to dispose of such questions as may be deemed material.

The first question raised, grows out of the organization of the bank in 1860, under the act to authorize the business of banking, approved February 27th, 1850. The fifteenth section of the act states that "any number of persons, not less than seven, citizens of this state, may associate to establish offices of discount, deposit, and circulation, on the terms and conditions, and subject to the liabilities, prescribed in this act;" the aggregate of capital not to be less than \$50,000. The certificate for the organization of the Cataract City Bank, which was filed in the office of the Secretary of State, and clerk of Passaic county, is in the following form :

Paterson, N. J., October 23d, 1856.

R. M. Smith, esq., State Treasurer—Dear Sir :

We, the undersigned, do hereby associate ourselves together, under the laws of this state to authorize the business of banking, under the name of the Cataract City Bank, and have subscribed for three thousand shares, of fifty dollars each, and shall pay in, on the day of commencement, sixteen

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and two thirds dollars upon each share, making the sum of fifty thousand dollars, which we propose to use under said banking law, in the city of Paterson, Passaic county, New Jersey, and to deposit with the State Treasurer fifty thousand dollars of Virginia state bonds, or other stocks, as the law requires, for the same amount of bills, to be registered by him, to commence with ; and shall from time to time deposit more securities for a like purpose, as the association may require, until we get the full amount of three thousand shares ; said association to continue twenty years from date above.

Five shares to Thomas D. Hoxsey, of Paterson.

Five shares to Benjamin Buckley, of Paterson.

Five shares to P. Rafferty, of Paterson.

Five shares to Nathaniel Lane, of Paterson.

Five shares to Edward G. Ford, of Paterson.

Five shares to Thomas O. Smith, of Paterson.

Five shares to R. B. Chiswell, of Paterson.

Two thousand nine hundred and sixty-five shares to Charles Sanford, of Paterson.

We have also appointed Charles Sanford president of this bank. Any communication you may receive from him, as said president, you will please consider duly authorized.

The foregoing certificate was duly signed by Mr. Sanford and his seven associates, and on the same date was duly acknowledged by them, before William Gledhill, esq., master in chancery, and filed in the office of the Secretary of State, and clerk of Passaic county, as the statute requires.

From the evidence, and the admissions in the case, there is no question that the whole bank really belonged to Charles Sanford, and that he paid the whole of the sixteen and two thirds dollars on each of the three thousand shares of stock, being the first and only instalment paid, and amounting to the sum of \$50,000, or one third of the entire capital of the bank which the article of association called for. The certificate not only states the terms of the organization of the

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bank, but adds that "we (the eight associates) have also appointed Charles Sanford president of this bank." The making and filing of this certificate made "the said persons so associating" a "body corporate and politic, by the name mentioned in said certificate," according to the seventeenth section; and by the eighteenth section, "every such association shall have power to choose a board of directors, and *under the direction* of such board to carry on the business of banking," "may loan money," "choose one of their own number president, appoint a cashier, and such other officers and agents as their business may require," &c. The persons who signed the certificate were only associates and not directors. They chose a president of the bank, but they had no legal power to do so; but they had the power to choose a board of directors, and under the direction of the board to do banking business, loan money, and "choose one of their own number to be president," and to appoint a cashier, and other officers. But this bank never had a board of directors or other officer legally chosen; it was conducted entirely, from its commencement to its failure, by Charles Sanford, the owner and appointed president of the same, precisely as if he had started it as an individual bank of his own. But through the instrumentality of the seven citizens of the state who signed the certificate with him, he was enabled to commit a fraud upon the statute, and use it for individual purposes, when it was only intended to be used by at least seven *bona fide* citizens and holders of stock.

Under this state of things, a question has been raised as to the character in which the court should hold these seven persons.

It was insisted on the argument, that they must be considered as "directors or managers," within the intent and meaning of the "act to prevent frauds by incorporated companies," (*Nix. Dig.* 371, § 2,*) and so as to charge them in that character; but I do not so consider them. As there never were any directors chosen, they could, of course, not be directors, and as they never paid any money to the bank

* This section not re-enacted in the "act concerning corporations," approved April 7th, 1875.

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for their stock, and had no interest in the company, and took no part in its management, nor had a right to do so, they, of course, cannot be charged as managers. They can only be considered as, what in fact they are, associates, and stockholders to the amount of stock subscribed by them, for the purpose of organizing a bank under the statute, with the simple power to choose a board of directors, on whom would devolve the power and duty and responsibility of exercising the banking power under the statute.

But the bank, after a short existence under the sole management of Mr. Sanford, became insolvent, with debts largely exceeding its assets; and the creditors insist that the bank, having called in but one third of its capital, the stockholders are bound to pay so much on their stock, not exceeding in all the fifty dollars a share, as will be sufficient, with the assets in hand, to liquidate the debts of the bank. There is no doubt of the correctness of this principle with regard to *bona fide* stockholders, and if the directors neglect or refuse to assess the stockholders, even of an insolvent incorporation, to effectuate that object, a court of equity will make an order for such assessment, and to carry the same into effect as far as possible.

The evidence in the case shows, that shortly after the bank failed Sanford died insolvent, and as he held in his own name two thousand nine hundred and sixty-five shares, there remained but thirty-five shares held by the seven other associates, each subscribing five shares. But the question is asked, are they *bona fide* stockholders, having never paid anything for their shares, Sanford himself paying all, and they merely lending him their names and subscribing his certificate, to enable him to go on with his bank? Will a court of equity consider them such? But how, indeed, can a court of equity consider them anything else but *bona fide* stockholders and associates? They are respectable and intelligent business men, and knew that the law required not less than seven citizens of the state (Mr. Sanford had but recently come into the state; whether a citizen of the state

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at the time does not appear,) to organize a bank, and they, without deception, and in full knowledge of their responsibility, placed their *bona fide* signatures to the certificate for five shares of stock each. The law and the State Treasurer considered and treated them as *bona fide* stockholders; and in that character only, they were the means of starting the bank, which has done the evil we are now trying in some measure to adjust. How, then, can a court of equity treat them in any other character than such as they have, under their own signatures, represented themselves, for the purpose of carrying into effect an important act of the legislature? It is not supposed that any of these gentlemen imagined that evil would grow out of their proceedings, but they took the responsibility, and they must abide by their acts. The court cannot relieve them from the well settled and salutary rule relating to stockholders of an insolvent corporation. The enforcement of the rule in a case of this kind, will be right in itself, and salutary to the public. Good men too easily lend the use of their names for directors or other officers of incorporations, or what purport to be benevolent institutions, at the solicitation of those who demand merely the use and influence of the name, and not the official action of the person; and it is quite time that honest men understand that courts cannot relieve from the responsibility thus voluntarily assumed. *Angell & Ames on Corporations*, ch. 17, sections 599 to 602, and the cases referred to.

The legislature have settled this matter in the "act concerning corporations." In section five, it is provided that "where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay, on each share held by him, the sum necessary to complete the amount of each share, as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company." *Nix. Dig.* 151.*

The second section of the "act to prevent frauds by incorporated companies," (*Nix. Dig.* 371,†) provides that "when-

* *Rev.*, p. 178, sec. 5. † *See note*, p. 166.

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ever any such incorporated company shall become insolvent, or shall suspend the ordinary business of the said company for want of funds to carry on the same, it shall not be lawful for the directors or managers of the said company, or for any officer or agent of the said company, to sell, convey, assign, or transfer, any of the estate, effects, choses in action, goods, chattels, rights or credits, lands or tenements, of the said company; *provided always*, that in case of a *bona fide* purchase, made for a valuable consideration, before the said company shall have actually suspended the ordinary business of the said company as aforesaid, by any person having no knowledge, information, or notice of the insolvency of the said company, such purchase shall not be invalidated or impeached." The object of this section is to prevent preferences, and to secure an equal distribution of the assets. 1 *Stockt.* 457; 2 *Stockt.* 13.

In order to evade a sale or transfer under this section, it must appear, first, that the incorporated company had become insolvent; and this court has determined that a bank without funds for the redemption of its notes, and depending on individual resources and exertions to provide funds, rather than upon the immediate ability of the institution itself, is insolvent within the act; or, second, that it had suspended the ordinary business of the company, for want of funds to carry on the same.

In either of these cases, the company and its officers are prevented from selling or transferring any of its property or assets; and such sale or transfer is null and void against the creditors, unless the sale was a *bona fide* purchase or transfer for a valuable consideration, before the company had actually suspended its ordinary business, by a person having "no knowledge, information, or notice" of the insolvency of the company, or of the sale being in contemplation of its insolvency.

The first case I shall consider under the objection arising on this section of the act, is the transfer of property and assets of the company to Philip Rafferty, to the amount of

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\$7005.40, by Mr. Sanford, about the time of suspension, in payment of that amount due him from the bank. Mr. Rafferty was very fully examined before the master on this point of the case, and he states that on Friday, the 23d of November, Mr. Sanford called on him and wanted to borrow of him for the bank \$5000; said the bank could get along with that. He offered to the witness the bank pocket-book of collaterals to select from, as security; it contained a part of the bills which he afterwards took. Sanford said the bank was perfectly solvent, and he would protect the witness at all hazards. He said there was \$35,000 paid in, and only \$3000 or \$3500 tied up by judgments; but stocks were going down, and the bills were coming in, and he wanted \$2000 that day to square up with the Paterson Bank. Witness then let Sanford have that amount, and Sanford offered to secure him with collaterals, which witness did not then take, he being perfectly satisfied that the bank was sound, and he offered and arranged to go with the president to Jersey City, and try and raise a loan. Sanford knew the money was held by Rafferty, as treasurer of Paterson. Witness refused the collaterals, and told him to take them to Jersey City to raise the loan; on the next day, Saturday, November 24th, Rafferty went to Jersey City to raise a loan, with Sommers, the cashier. Sanford could not go. They went to the Mechanics and Traders Bank, in which Rafferty was a director, but Mr. Fox (the president or cashier) declined to loan on account of the stringency of the times. Sommers had with him, and offered as security, the collaterals of the bank. Rafferty offered himself to become security for the loan; not being able to effect it, he let Sommers have for the bank, as a temporary loan, \$3500. He knew the money was that of the city of Paterson, in his (Rafferty's) hands, as treasurer. The collaterals were again offered to him, which he declined, as he expected a loan would be effected with the collaterals, and then a settlement would be made with him. He called at the bank three times afterwards to have the settlement, but did not meet with Sanford; when he called on the 29th,

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Sommers said Sanford had gone to Trenton. Rafferty wanted Sommers to fix up the settlement or account. Sommers said he had better see the president. On Friday night, the 30th of November, he went to see Sanford at his residence, a mile out of town, not being able to meet him during the day, owing to absence of one or both of them. He, Sanford, was not at home, and witness left word for him to meet him at the bank early next morning, as he had to go out of town. He met him at seven o'clock next morning, at the bank; it was not yet open, but Sommers went in with him at the side door, and got the collaterals and gave them to Rafferty, all of which he afterwards collected, except a note of \$335, which was assigned to Paterson city. Sanford was present and agreed to the transfer. He kept his accounts as treasurer in the Cataract Bank; his private account in the Mechanics and Traders Bank at Jersey City. It was on Saturday, the 1st day of December, Rafferty received the collaterals, amounting to \$7005.40. Sanford told him he had better take the bills (collaterals), and he could get them discounted. When at Jersey City, on the 30th, he was told that the Cataract Bank was but a one man bank, and no directors; and the same night Hoxsey told him to settle that night, and take anything he could get. He was a little scared, and determined to have a settlement. He received of the bank \$7005.40 only, within a few cents certainly of that amount, being the amount of his temporary loans, and his balance in the bank, for all which the collaterals had been previously offered.

The statute says (section 2,) "whenever any such incorporated company shall have become insolvent, or shall suspend the ordinary business of said company for want of funds," &c., it shall not be lawful to sell or transfer, &c., its property or choses in action. Now the transfer of the securities to Mr. Rafferty was on Saturday morning, December 1st, and the bank did not suspend its ordinary business, and close its doors, till Monday, the 3d; consequently, no unlawful transfer to him can be alleged on the ground of the actual suspension of the bank, and the present case must rest entirely on the ground

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that the institution was insolvent, and there is now no doubt of that fact. Rafferty says it was insolvent on the 23d of November, as he learned after he became receiver. Yet, if Mr. Rafferty stands in the character of a "*bona fide* purchaser for valuable consideration, without knowledge, information, or notice, of the insolvency of said company," his transfer or purchase being prior to the suspension, the statute says, "such purchase shall not be invalidated or impeached." No question has been raised as to this transfer being for a valuable consideration; indeed, the evidence abundantly shows that the bank, under very peculiar circumstances, was indebted to the full amount of all that he received. Nor is there any question as to the *bona fides* of the transaction, unless that be affected by previous knowledge or notice.

Had, then, Mr. Rafferty such previous "knowledge, information, or notice, of the insolvency of the said company," as to render the transfer to him illegal and void? Notice of an unregistered mortgage gives it priority to a subsequent registered mortgage or purchase. And it has been held, in cases of this character, that whatever is sufficient to put a person on inquiry is good notice; thus, if a man knows the legal estate or the possession is in another than the vendor, it will be sufficient to put the party on inquiry as to the character of that estate or possession, and to charge him with the knowledge thereof. *Freeman's Chan. Cas.* 137, and numerous cases collected in the notes to *Le Neve v. Le Neve*, 2 *White & Tudor's Eq. Cas.* [34.]

But the knowledge of the solvency or insolvency of a bank cannot depend on mere constructive notice, or what will put the party on inquiry. The statute says, "no knowledge, information, or notice," of the insolvency. The first term refers to actual self-knowledge; the second to the knowledge imparted to him; and the third to that which he acquires from notice, formal or otherwise. But each term implies knowledge, not mere suspicion, supposition, or belief, which any one may have himself, or have imparted to him. The counsel for the petitioners has urged with some force, that Mr.

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Rafferty, being a director of the bank, or manager of the association, is chargeable with notice of the insolvency of the bank. This would ordinarily be the case, if Mr. Rafferty was either a director or manager; but we have already decided that there were no directors, and that he was not a manager, but a mere corporator or associate, or nominal stockholder. Had he, then, such knowledge as the statute requires to invalidate the act? He seems to have known very little of the bank. He did not even keep his private accounts in it, though, pursuant to a resolution of the city council, he kept his treasurer's account there. He had full confidence in Sanford, the president, and Sommers, the cashier, and they would seem to have been the only persons who knew, or who could know, the condition of the bank, or give any accurate information respecting it. And, as far as appears from the evidence, all his assurances from them were that the bank was solvent. Sanford told him that it was; that \$35,000 had been paid in, and only \$3000 or \$3500 tied up with judgments. He, himself, had great confidence in the bank, and in its solvency; for, although the funds he had were funds of the city treasury, which were soon needed, and of which he must give a strict account, he hesitated not to make the temporary loans of \$2000 and \$3500, refusing all collateral security, leaving that to be used to obtain a more permanent loan than his.

Rafferty's confidence in the bank and in Sanford, does not appear to have abated until Friday, the 30th of November, when he was told at Jersey City it was a "one man bank," without directors, and in the evening of the same day, when he was urged by Hoxsey to have a settlement that night, and take what he could get. Then he says he "got a little scared," "got in his mind that Sanford had deceived him," and, not having been able to see Sanford for several days, he went to his house the same evening to see him, and he being absent, made the appointment to meet him next morning, which he did, and received the bills and collaterals.

So far as I can learn, he had, up to the time of his receiving the collaterals, no knowledge, information, or notice, of

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the insolvency of the bank. It is manifest he had no knowledge of his own, and so far as the evidence goes, neither knowledge nor notice was imparted to him; for the person who talked with him at Jersey City, and Mr. Hoxsey, had no knowledge to impart. They told him of their suspicions or fears, and these he may have had himself. But mere suspicions or fears constitute neither knowledge nor notice, although they may have influenced him to urge a speedy settlement. Independent of the question of notice, Mr. Rafferty had some claims on these collaterals. They were offered to him on the 23d of November, when he made the temporary loan of \$2000, and again on the 24th, when he added to that loan, \$3500. But he declined to take them, preferring that the bank should retain them to enable it to make a more permanent loan, and settle with him for his temporary accommodation and the prior balance, as promised. When the bank failed to secure that loan, and was unable to repay Rafferty, he had at least an equitable claim on the securities, and to be placed in as good a situation as to security, as a more permanent loan would have been placed. Besides the pre-existing debt constituted a valuable and *bona fide* consideration for the transfer of the bills and notes. 16 *Peters* 1; *Story on Prom. Notes* 195; 1 *Zab.* 665.

Under these considerations, I feel entirely satisfied that the receiver should not be held accountable for the \$7005.40 paid to him in collaterals.

There are some other cases where the bills and securities of the bank were transferred to its debtors about the time of, or shortly before, its stoppage. On Saturday, the 1st of December, James Dunn, the complainant in the bill in this cause, had his account reduced from \$3500 to \$3000 by the receipt of bills or money; but this was before the bank stopped payment, and Mr. Dunn seems not then to have had any notice or knowledge of its insolvency, though he had some fears, and was anxious about his deposit; but this did not affect the payment or transfer to him. He states in his evidence, however, that on Monday, about three o'clock, he received from the

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bank, on his deposit, assets to the amount of \$500, in addition to the \$500 received on Saturday.

An objection is also taken to an allowance of a payment by the bank of \$376.50, to A. A. Hopper.

A short time before the bank failed, some of its friends made an effort to raise a loan for the bank, to relieve it from the pressure and stringency of the money market. A certain sum was to be raised by contribution. S. Pope agreed to contribute to the loan, if successful, \$376.50, and he placed that sum in the hands of A. A. Hopper to hold until the loan was completed, and he put it in the bank as a special deposit. The loan was not completed, and after the assets of the bank came into the hands of the receiver, he, on application, paid the money over to Mr. Hopper for Mr. Pope, as property not belonging to the bank, and I think the payment was right and legal.

Exceptions are also taken to a payment of \$1016.49 by the bank to J. S. Huntoon, on the 1st of December, as appears by the books of the bank. But Mr. Huntoon, on the 3d of December, swears to the complainant's bill, that "the statements of his actings and doings, and of his connection with said Sanford, and of *his deposit balance* in said bank, &c., are true."

The bill states that "said Huntoon had a deposit in said bank of about nineteen hundred dollars." But deducting this payment of \$1016.49 from Mr. Huntoon's account, it leaves a balance of \$946.25, which is all he claims of the bank. Hence, it is inferred that the payment could not have been made until after the bill was sworn to, on the 3d of December, which was about the time, or after it, that the bank had closed its doors and stopped payment, and if so, Mr. Huntoon, according to his affidavit, may have had notice or knowledge thereof. Still the entry of payment is on the 1st day of December, before the bank was closed.

I shall, therefore, report that the receiver exercises the powers conferred on him by this court and the statute, and ascertain whether the said payment was made after the bank

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closed, or after Mr. Huntoon had knowledge, information, or notice, of its insolvency; and if so, that he proceed to adjust or collect the same, if it be practicable to do so. And I shall make the same report in respect to the alleged payment to John Cassedy for the Jersey City Bank, on the 3d of December, of \$3000; and also in regard to payments alleged to have been made to James Dunn, and to Towle and Van Dyke, after the stoppage of the said bank, or after they had knowledge, information, or notice, of its insolvency. Sanders and Sommers are alleged also to have received pretty large sums after the known insolvency, or failure and stoppage of the bank, but the evidence shows that they have both died insolvent. And as to any other persons of whom there is evidence of having received money or assets of the bank, on account of payments for money due them, with knowledge, information, or notice of the stoppage of the bank, or of its insolvency, at the time of such payment, the same report will be made for the receiver as in the previous cases.

In regard to Beach, the exchange broker of the bank in New York, who stands on the books of the bank a debtor for \$33,955.18, judgments were obtained against him, and nothing realized; and the counsel in the suits informed the receiver that nothing could be recovered, and nothing was or could be realized from the debt of \$35,000 against Sanford, the president.

No settlement has been made with the treasurer in regard to the bonds and securities deposited with him for the redemption of the notes of the bank, but when the limitation has expired, it will be the duty of the receiver to collect any overplus that may remain with the treasurer.

There are some minor exceptions as to small accounts, discrepancies in the books of account, and moneys paid for small expenses or counsel fees, of which it is only necessary to say, that they have not been sustained by the proof, or are considered invalid.

The question of interest, if any, and all other matters may be referred to the final account of the receiver.

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Whatever objections might have been raised to the appointment of Mr. Rafferty as receiver, there appears to be no substantial reason why he should be removed.

The receiver will proceed, therefore, to settle up the business, and to make his final report, as soon as circumstances will permit.

C A S E S

ADJUDGED IN

THE COURT OF CHANCERY

OF THE

STATE OF NEW JERSEY.

FEBRUARY TERM, 1867.

**ZABRISKIE vs. THE HACKENSACK AND NEW YORK RAIL-
ROAD COMPANY, and others.***

1. A legislative charter is a contract between the state and the corporators, which the state cannot impair.

2. Corporators or partners, associated for a special purpose specified in their charter or articles of partnership, cannot change that purpose without the consent of all the corporators or partners.

3. The reservation in a charter, that the state may, at any time, alter, amend, or repeal it, is a reservation made by the state for its own benefit, and is not intended to affect or change the rights of corporators as between each other. Nor does it authorize the state to authorize one part of the stockholders, for their own benefit, at their mere option, to change their contract with the other part.

4. The power to alter or modify a charter is restrained to the powers and franchises granted by the charter. It does not authorize the legislature to change the object of the incorporation, or to substitute another for it. An alteration or modification is necessarily of the grant or thing to be altered or modified, and cannot be done by substituting a different thing; that would be a change.

5. A grant of an additional franchise to a corporation, not affecting or impairing those before granted, does not alter or modify the charter, if it

* CITED in *M. & E. R. Co. v. Sussex R. Co.*, 5 C. E. Gr. 564; *Black v. Del. & Rar. Canal Co.*, 7 C. E. Gr. 404, 416; *S. C.*, 9 C. E. Gr. 464, 466; *N. J. Midland R. Co. v. Strait*, 6 Vr. 325.

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does not compel the corporation to exercise such franchise. Such grant can be made, whether the right to alter and modify be reserved or not. But in neither case can the corporation be compelled to accept them, nor can part of the corporators accept them, without the consent of all.

6. Corporators, who stand by and suffer the company to construct a new work authorized by law, without interference, will be held to have acquiesced in it, and, by such acquiescence, will lose their remedy in equity.

This case was argued upon a rule to show cause why the defendants should not be enjoined from mortgaging the property of the company, or from expending its funds in the construction of a road not authorized by their charter, but being an extension of the original road, authorized by a supplement to their charter.

Mr. C. H. Voorhis, for complainant.

The funds and credit of an incorporated company, established for a certain definite purpose prescribed by its charter, cannot, without consent of all the shareholders, be diverted from such purpose, though the misapplication be sanctioned by the votes of a majority. *Angell & Ames on Corp.*, § 391-2.

The charter is the article of association or partnership between the shareholders.

Whether this extension will be profitable or not to the shareholders, is immaterial. It is the right of a partner to hold his associates to the specified purposes whilst the partnership continues, and to have the partnership carried on according to the original contract. *Kean v. Johnson*, 1 *Stockt.* 417.

The funds and property of a company, chartered to build a railroad from the Erie to Hackensack, cannot, even with legislative sanction, be used to build a railroad from Hackensack to the state line against the consent of a single shareholder, and the court will interfere by injunction. *Stevens v. Putland and Burlington R. Co.*, 1 *Amer. Law Reg.*, (old series,) p. 154.

The supplement has not even been accepted by vote of

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a majority of the stockholders, granting such acceptance to be sufficient, as held in *Durfee v. Old Colony and Fall River R. Co.*, 5 *Allen* 230.

Power to mortgage for the extension is confined to the extension. See *Supplement, Laws of 1861*, p. 256, § 4. Power granted by the charter to mortgage the old road for any purpose, limited to \$50,000. *Laws of 1856*, p. 350.

Mr. Knapp and Mr. Hopper, for defendants

THE CHANCELLOR.

The Hackensack and New York Railroad Company was incorporated in 1856, with power to construct a railroad from Hackensack to the Paterson and Hudson River Railroad, with a capital stock of two hundred thousand dollars, and with power to mortgage its road and lands, franchises and appurtenances, to the amount of fifty thousand dollars. Under this act, it laid out, located, and built a road five miles in length, terminating at Essex street, in Hackensack, within one mile of the court-house, as required by the charter. It borrowed thirty thousand dollars, for which it gave a mortgage upon the road and its equipment, franchises, and other property. By a supplement to this charter, passed March 12th, 1861, it was authorized to extend the road northwardly to Nanent, on the Erie railway, in the state of New York, a distance of about twelve miles, to increase the capital stock to any extent required, and to issue bonds to the amount of two hundred and fifty thousand dollars, which, in the words of the act, were "for the construction and equipment of the road to be constructed under this act, and to secure the payment of said bonds, the said company shall have power to mortgage the said road, with its franchises and chartered rights."

In 1861, the company extended its road under this supplement to a point on Passaic street, in the village of Hackensack, more than a mile from the court-house, the length of the extension being about a mile. After this, it executed a new

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mortgage upon the whole road, as extended, and its equipments, and its franchises and chartered rights, to secure the payment of ten thousand dollars. No new stock was issued for this extension.

The company has recently, under the supplement of 1861, laid out and located another extension for about a mile and a half north of the present terminus, reaching from Hackensack to New Bridge, and has made contracts for the construction of it, and has, by resolution, determined to make a new mortgage to cover the whole road, as it will be when finished to New Bridge, with its equipments and appurtenances, and the chartered rights and franchises of the company, to secure one hundred bonds of one thousand dollars each, for the purpose of paying off the two mortgages which are now on the road; for relaying with new rails and ties the road first built, and furnishing it with the necessary equipment, which is now deficient for its business; and for constructing and equipping the extension to New Bridge.

The complainant is a stockholder in the company; and of nine hundred and thirty shares of capital stock issued, for one hundred dollars each, he owns three hundred and twenty-four. He applies for an injunction to restrain the defendants from constructing the extension to New Bridge, and from executing the mortgage proposed.

He opposes the extension, on the ground that it is a different enterprise from that for which his stock was taken, and the money paid, and that neither the directors, nor a majority of the stockholders, can compel him to embark his capital in any undertaking but the one for which it was subscribed and paid.

The extension to Nanent, authorized by the act of 1861, has never been submitted formally to the stockholders, nor has it in any way been approved of by them, or a majority of them, except by the assent given in the answer in this suit, to which the directors are made defendants, which is sworn to by the directors, individually, who own together five hundred and seventeen shares of the capital stock.

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But of this, two hundred shares, held by one of them, Mr. Robert Rennie, is special stock, issued to him to build the Lodi Branch, which is leased to him during the existence of the company, and which he is to operate at his own expense and for his own profit, under an agreement that he shall pay as rent, the dividends that may be declared on these two hundred shares; and under another agreement, endorsed on the certificate of stock issued for these shares, that they are to be entitled to no dividends beyond the rent of the Lodi Branch, or in other words, that he is to pay no rent, and this stock is to receive no dividends. Under these circumstances, this stock can receive no benefit from the extension if it is profitable, nor sustain any loss from it if it is ruinous. And it would seem that if the consent of a majority of the shareholders was necessary to the new enterprise of the extension, that the assent of the other three hundred and seventeen shares held by the directors, not being a majority of the whole stock held by the complainant, who dissents, is not the consent of the majority of the stockholders. And, if it is necessary to obtain the consent of a majority to make the extension authorized by the supplement of 1861, that consent does not appear in the cause as now presented.

The extension authorized by the act of 1861, is a radical change in the object of this corporation; it is an enterprise entirely different from that in the charter. That was to construct and operate a railroad from Hackensack to the Paterson railroad, at Boiling Spring, an easy and almost direct route to New York; it was from a thriving village, the county town of Bergen county, over a level country, and only five miles in length, as shown by the return of its location. The extension would be about twelve miles in length, through an uneven country, mostly, if not wholly, agricultural; with no village, except the very small one at New Bridge, on its route; and it runs into the state of New York some distance, and terminates at a point on that part of the Erie railway which the company have abandoned for regular traffic, and on which few trains are run. It is an entirely different enterprise.

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The question here is, can this company, either with or without the consent of a majority in interest, of its stockholders, compel the complainant to embark capital subscribed for the first enterprise, in this new one, entirely different.

Since the Dartmouth College case, in the Supreme Court of the United States, the doctrine has been considered firmly established, and been confirmed by repeated decisions, both in that court and the state courts, that a charter, granted by the legislature to a corporation, is a contract between the state and the corporators, and that the state can pass no act to take away or impair any of the franchises or privileges granted by it. The company, or artificial person thus created, and its property, is subject to all general laws and police regulations made by the legislature after such grant, in the same manner as natural persons and their property are; provided they are not such as to take away or impair any of the franchises plainly granted by the charter. This doctrine did not prevent the legislature from conferring new privileges upon any corporation, to be accepted at its own election.

It is also settled, upon the principles of the common law, in this state, and most of the states of the Union, that when a number of persons associate themselves as partners, for a business and time specified in the agreement between them, or become members of a corporation for definite purposes and objects specified in their charter, which in such case is their contract, and for a time settled by it, that the objects and business of the partnership or corporation cannot be changed, or abandoned, or sold out, within the time specified, without the consent of all the partners or corporators; one partner or corporator, however small his interest, can prevent it. And this is so, although by law a majority in either case can control or manage the business against the will and interest of the minority, so long as it is within the scope of the partnership or charter.

This rule is founded on principle, the great principle of protecting every man and his property by contracts entered into, a guiding principle in all right legislation, and incor-

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porated into the constitution of the United States, and of almost every state in the Union. And the rule is not changed because the new business or enterprise proposed is allowed by law, or has been made lawful since the association was formed.

The leading case on this subject is that of *Natusch v. Irving*, decided by Lord Eldon, in 1824. It is not contained in the regular reports, but may be found in the appendix to *Gow on Partnership* (3d ed.) 576, or in *Lindley on Partnership*, p. 511. There, a partnership was formed for life insurance, and after it was entered into, an act of Parliament made it lawful for such a firm to enter upon the business of marine insurance, which was prohibited to them before. A majority of the partners determined to embark in the business of marine insurance, thus made lawful. Lord Eldon held them barred by the contract of co-partnership, unless every partner agreed to alter it. In England, the same doctrine is applied to corporations rigidly, and is acknowledged in all cases on the subject. And although, from the omnipotent power of Parliament, restrained by no written constitution, they hold that the contract can be changed by act of Parliament, yet the English Court of Chancery will enjoin the directors or the corporation, on application of a single stockholder, from using the common funds to apply to Parliament for a change.

The doctrine of *Natusch v. Irving* was adopted in New York by Chancellor Kent, in the case of *Livingston v. Lynch*, 4 *Johns. C. R.* 573, and in this state, by the decision of Parker, master, sitting to advise the Chancellor, in *Kean v. Johnson* 1 *Stockt.* 401, and has been recognized and adopted in almost all the states of the Union.

The opinion of Chancellor Bennet, in *Stevens v. The Rutland and Burlington R. Co.*, 29 *Vt.* 548, (also found in 1 *Am. Law Reg.* 154,) contains a very able exposition and application of it. It will also be found in *Ang. & Ames on Corp.*, § 391-3, and § 536-9; *Lindley on Part.* 515; *Pierce on Railways* 78; *Hart. & N. H. R. Co. v. Crosswell*, 5 *Hill* 383; *Troy and Rutland R. Co. v. Kerr*, 17 *Barb.* 581; *Mace-*

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don Plank Road Co. v. Lapham, 18 Barb. 312; *Buff., Corn., and N. Y. R. Co. v. Pottle*, 23 Barb. 21; *Banet v. The Alton and Sangamon R. Co.*, 13 Ill. 504; *Graham v. Birkenhead R. Co.*, 2 McN. & G. 156.

After the effect of the rule established in the Dartmouth College case began to be felt in the states, it was found that by the numerous acts of incorporation, freely and perhaps necessarily granted, great inconveniences resulted, and that provisions incautiously inserted, too much restricted the power of future legislatures; and that the laws, which experience showed were necessary to govern corporations in the exercise of their powers, could not be passed. And the legislature of many states, by degrees and successively, adopted the practice of inserting in acts granting franchises, that they might alter, modify, or repeal the act; and also, by general law, provided that all acts of incorporation thereafter passed, should be subject to such alteration and repeal.

The provision is contained in the general act of this state, passed in 1846, (*Nix. Dig.* 152, § 6,)* that such charters should be subject to alteration, suspension, and repeal, in the discretion of the legislature. This and all similar special and general provisions were intended for the purpose specified; to give to the legislature the clear right, at their pleasure, to alter or repeal the acts of incorporation. The state, without this, could have done it with the assent of the corporators. They could give them property; they could add to their powers or privileges. But they could not take away any power, privilege, or franchise, conferred by the act, nor compel them to exercise any new power or franchise conferred.

Besides this general law of the state, the charter of the defendants contains this provision, that "the legislature may, at any time, alter, modify, or repeal the same."

The object and purpose of these provisions are so plain, and so plainly expressed in the words, that it seems strange that any doubt could be raised concerning it. It was a reservation to the state, for the benefit of the public, to be

* *Rev.*, p. 178, § 6.

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exercised by the state only. The state was making what had been decided to be a contract, and it reserved the power of change, by altering, modifying, or repealing the contract. Neither the words nor the circumstances, nor apparent objects for which this provision was made, can, by any fair construction, extend it to giving a power to one part of the corporators as against the other, which they did not have before.

It was to avoid the rule in the Dartmouth College case, not that in *Natusch v. Irving*, that the change was made. The words limit the power to that object.

On general principles, and the settled rules of construction, I would hold this to be the effect, and only effect, of the provision in the general act and in the charter of the defendants, without any hesitation, were it not for a series of decisions by most respectable courts, which hold that this provision obviates the effect of the rule in *Natusch v. Irving*, and *Kean v. Johnson*, and enables a majority of the corporators in all charters subject to a like provision, to change, by legislative permission, and within certain limits, the object and purpose of the corporation. They hold that the contract between associate corporators, that they will confine their business to life insurance, is changed by legislative permission to engage in marine insurance, or a contract to join in constructing a railroad from New York to Newark, can be changed to one from New York to Elizabeth by legislative consent. The reasoning is founded on the fact that the subscription for the stock, which is the contract, was made as in this case under a charter which authorizes a road from the Paterson road to Hackensack, and authorizes the legislature to alter and modify the act. And from this they infer that it is a contract to join in building any road that the legislature may, by such alteration, authorize the company to build; and that such authority, or additional privilege, may be accepted by a majority of the corporators.

So far as the alteration is made by the legislature, in a way to be compulsory on the corporation, this is correct; as, if they should require the company to build a double track,

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or widen the draws in a bridge, or exact less fare or toll; these would be within the contract, or would be annexed to it as a condition, and every stockholder would take his stock subject to the contingency of such alteration.

But if the change in the act is simply offering the corporation the privilege of entering upon another and a different enterprise, it is not within the condition to the subscription. The only construction to be given is, that the legislature may alter, not that the stockholders may, as between each other. The case of *Natusch v. Irving* was decided upon this very ground. The act of Parliament had given the company the power to embark in marine insurance, but the consent of all the parties was still held necessary. The plain object of the reservation in this case was to give the legislature, not a bare majority of the stockholders, power.

This view of the case is so clear upon principle that I feel constrained to be guided by it, although the weight of the decisions in other states is against it.

In Maine the decisions of the Supreme Court are in accordance with it. In the case of *The Meadow Dam Co. v. Gray*, 30 *Maine* 547, the company was incorporated to build a dam across navigable waters. Under the power reserved to alter and repeal, an act was passed requiring it to make in the dam, a lock for the benefit of public navigation. This was not increasing the powers or changing the enterprise of the corporation, but requiring, in the work authorized, an accommodation for the public, omitted in the original act. What the change was is not mentioned in the report, but it is stated in the *Oldtown and Lincoln R. Co. v. Veasie*, by Chief Justice Shepley, who delivered the opinion in both cases.

In the case of the *Oldtown and Lincoln R. Co. v. Veasie*, 39 *Maine R.* 571, the act of incorporation, passed March 8th, 1852, authorized not less than eleven thousand, nor more than fifteen thousand shares. *Veasie*, August 13th, 1852, subscribed for one thousand shares; only nine thousand five hundred shares were subscribed. A supplement, passed September, 1853, under the power reserved to alter, fixed the capital

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at not less than eight thousand, nor more than twenty-five thousand shares. This was accepted by the directors. Veasie was sued for his subscription, and objected on the ground that until the supplement was passed, the number of shares required to constitute the company not having been subscribed, he could not be sued for his subscription, and that the legislature under the power reserved, although they might alter the charter, could not affect the rights of the stockholders between themselves, or change their contract with the company.

The court held that he was not liable under the original act, to be sued until eleven thousand shares were subscribed for, and that the power to amend did not authorize a change in the rights or liabilities of the corporators between themselves.

Chief Justice Shepley says (p. 580): "The legislature might as well have attempted to alter a contract between the corporation and one of its members respecting the construction of the road, as a contract respecting any part of its capital. If a corporation, being party to a contract with one of its corporators, might, by the assistance of the legislature, absolve itself from the performance of any part of the contract, it might from the whole, and might require payment of the money subscribed, without allowing the subscriber to derive any benefit from it. It is the charter only, and the rights and liabilities of the corporators as such in consequence thereof, that can be varied by an act of the legislature, and not the private contracts made between the corporation as one party, and its corporators as the other."

Now in this case, the private contract between the stockholders and the corporation, or between them mutually, on subscribing for the stock, was that their enterprise was the road from the Paterson railroad to Hackensack, and the power reserved was not to authorize any of the parties to this private contract, at their pleasure, to violate it. The supplement of 1861 does not *require* the extension to be built; it only authorizes it at the option of the corporation. The words

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are, "it shall be lawful for said company to extend their railroad." And it is held in England, where the courts by mandamus compel a company to construct the road it is incorporated to construct, that an act giving the privilege of extension is not obligatory on the company, and the mandamus is in such case refused, *York and Midland R. Co. v. Regina*, 1 *Ellis & Bl.* 858; in which the Exchequer Chamber reversed the decision of the Common Bench, in 1 *Ellis & Bl.* 178, in the same case.

In New York a different rule has been established, and it is held that the power to alter will authorize the company, by consent of the legislature, to extend its enterprise without the consent of the stockholders. The rule was first adopted to enable companies to subscribe to the stock or bonds of other enterprises that brought business to them, and then was extended to cases where they were authorized to build extensions or branches to their own works. *North R. R. Co. v. Miller*, 10 *Barb.* 260; *White v. Syracuse and Utica R. Co.*, 14 *Barb.* 560; *Sch. and Sar. Plank R. Co. v. Thatcher*, 11 *New York R.* (1 *Kern.*) 102; *Buff. and N. Y. City R. Co. v. Dudley*, 14 *New York R.* (4 *Kern.*) 336. The reasoning of the judges in these cases does not satisfy me. The courts which decided the first cases would not have adopted the principles which guided them, if they had been asked to apply it to a case like this, or like the later cases in New York.

In 14 *Barb.* 570, Judge Edwards, in delivering the opinion of the court, says, that under this reservation the legislature cannot create a new company with a new and distinct business, but that in the case before them, the company would remain the same as to its character, structure, objects, and business. It would have the same road, the same buildings and property, with the same agents, as it would have if the law had not been passed. But the principle of power to let a majority alter, is the same whether the alteration be great or small, and courts can exercise no discretion as to the extent of change which the company, by permission of the legislature, may adopt.

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In the case of the *Sch. and Sar. Plank R. Co. v. Thatcher*, 11 N. Y. 109, the court put their decision on the ground that the change was unimportant, and would not injure the defendant; and seem, by their reasoning, to admit that if the change had been as great as in the case of the *Hartford and New Haven R. Co. v. Croswell*, they would have decided differently.

In *The Buffalo and New York City R. Co. v. Dudley*, 14 N. Y. 355, Selden, J., in delivering the opinion of the court, places the decision on the ground that it was ruled in the case just quoted "that no mere addition to, or alteration of the charter, *however great*, could operate to discharge a stockholder from his obligation to the corporation," and he questions the soundness of the decisions in the *Hartford and New Haven R. Co. v. Croswell*. These decisions are not sufficiently consistent, or so based upon the principles that should govern this case, as to influence me to depart from the conclusions arrived at.

The Supreme Court of Massachusetts has followed the decisions in New York, and in the well considered and well argued case of *Durfee v. The Old Colony R. Co.*, 5 Allen 230, arrived at the conclusion that the reserved right to alter and repeal authorized a company to engage in a new enterprise, without the consent of all the shareholders. The reasoning of the able counsel who combated this position contains the best exposition of the law that I have found any where. The reasoning of Chief Justice Bigelow, in delivering the opinion of the court, does not convince me. He places the decision upon principles not acknowledged in this state, and relies upon the two cases in Maine, cited above, as well as those in New York, as supporting his view. He assumes (on p. 244,) that it is the object of the provision, that an amendment may be made by the consent of *both parties*, the legislature on the one side, and the corporation on the other; the former expressing its assent by a legislative act, and the latter by a vote of the majority of stockholders; and observes "that it is nothing more than the *ordinary* case of a stipula-

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tion that one of the parties to a contract may vary its terms, with the consent of the other contracting party."

Now in this state it is settled that an alteration made by the legislature, under this reserved power, is valid and binding, without the consent, and against the will of the corporation, and all its members. The two decisions in the Court of Errors, not yet reported,* upon the charters of the Morris and Essex Railroad Company, and of the Jersey City and Bergen Railroad Company, settle that the legislature may, against the will of the companies, change the mode of taxation prescribed in their charter for one more burthensome.

And the rule of the common law as to contracts, adopted here, gives the power to the parties, where both assent, to alter any contract without the stipulation for that purpose, which would seem from the language of the opinion, to be *ordinarily* inserted for it in Massachusetts. Such stipulation is seldom or never made in New Jersey.

This view, that the object of the reserved power was to give the majority of the corporators the power to control the minority, with the consent of the legislature, has never been adopted in this state. The act of Massachusetts, *Statutes* 1831, *ch. LXXXI.*, to which reference is made, contains no provision as to consent of the stockholders, but is a pure, simple reservation of power, like the act of New Jersey.

The decisions in the cases of *Banet v. Alton and Sang. R. Co.*, 13 *Ill.* 504, *The Pacific Railroad v. Renshaw*, 18 *Missouri* 210, *The Pacific Railroad v. Hughes*, 22 *Missouri* 291, hold that the majority of the stockholders, by authority of the legislature, may make a change, provided it is not great or a radical one. They, in express terms, say that a change like this would not be warranted, and so far as of authority, are on the side of the complainant.

But the principle on which they are decided is wrong; and if it is once conceded that a majority of the corporators may, by authority from the legislature, change the object of the enterprise in small things, there is no principle of law by which they can be restrained in any a little larger, or in the

* Since reported in 2 *Vr.* 521; *Id.* 575.

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character of the whole work. The same principle will lead the courts of Illinois and Missouri, as it did those in New York, to allow radical changes, and must, if consistently applied, allow a charter for a railroad to be used for banking or insurance business, or for a canal, theatre, brewery, or beer saloon.

There is no other alternative to the proposition, that while the power reserved authorizes the legislature, within certain limits, to make such alterations as they choose to impose, it gives no authority, when the legislature does not impose them, for the majority to adopt such alterations or enter upon such enterprises as are allowed by the legislature.

Again, the power of the legislature has its limits. It can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one, and oblige the stockholders to accept it. It can alter or modify the old one; but power to alter or modify anything can never be held to imply a power to substitute a thing entirely different. It is not the meaning of the words in their usually received sense. Power to alter a mansion-house would never be construed to mean a power to tear down all but the back kitchen and front piazza, and build one three times as large in its place. In anything altered, something must be preserved to keep up its identity; and a matter of the same kind, wholly or chiefly new, substituted for another, is not an alteration; it is a change.

In some cases there might be room for doubts, but in this case there can be no hesitation in saying that a railroad of seventeen miles from the Paterson road to Nanent, is a change and substitution of one work for another, and not an alteration of the road to Hackensack. They are substantially two different enterprises.

Again, the power is to alter or modify the act, and the true construction of this I hold to be, an alteration of something contained in or granted by the act. Any of the franchises granted may be altered; the right to take land by condemnation, the right to take tolls or fare, or the amount

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to be taken. But the legislature had no right to impose upon the company any other duty, or anything involving any other duty, than that attending the building a railroad from the Paterson road to Hackensack; anything in the manner of doing that they had a right to change. They could not oblige it to dam and drain all the meadows along the Hackensack, or to construct a canal, or to build a road from Hoboken to Newark, nor could they oblige it to extend its road to Nanent. They could as well oblige it to run to the Pacific. We must keep in mind that by the decisions in New Jersey the company need not accept the alterations; they are bound by them without acceptance if within the power reserved.

By a wider construction of this power any of the main lines of railroad running through the state, incorporated since 1846, or by an act which has in it the power of alteration, may be compelled to build and run a branch to any village or place near that route, that the legislature may direct. It must be held that the power to alter and modify does not give power to make any substantial additions to the work.

Again, the act of 1861 does not, in fact, alter or modify the act of 1856 in any one thing embraced in it. That act, and every power and franchise granted by it, and any duty it imposed, remains the same. And the defendants can now go on under it precisely as if the supplement had not been passed. The company is authorized to construct another road; it is not compelled to do it. If it builds it, or if it does not, its old charter remains with all its franchises and privileges intact, and no new burthens imposed, except so far as it assumes them. This is in no sense of the word an alteration of the charter. It would be as absurd to say that an owner had *altered* his house, who had built a larger one on an adjoining lot. And until the legislature have made a valid alteration of the charter, the rights of each stockholder are as held in *Kean v. Johnson*; he can prevent all the others from changing or abandoning the work.

The supplement of 1861 is a perfectly valid and constitutional act. It is a grant of privileges that the legislature have

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a right to grant, as they could grant to this corporation the right to conduct banking or insurance business, or to run a ferry across the North river ; but the company is restrained by the law of corporations and partnerships, from expending the money or using the credit of the corporation in such enterprises, unless every shareholder consents.

The extension to Passaic street, both because it comes within the grant in the charter, and more especially because every shareholder must be held to have consented to it by acquiescing in its construction and maintenance for years, must be decided to be lawful.

The defendants must be restrained from extending the road beyond its present terminus at Passaic street, and from expending any money of the company to pay for any such extension, or from giving any mortgage for the cost of such extension.

There is no foundation for an injunction against a mortgage for any lawful object, on either part of the road. There is great doubt whether a mortgage on either of the two parts of the road heretofore constructed, for the cost of the other, would pass the franchises of the company in such mortgaged part, but it would be valid as to the property other than franchises, which the company can mortgage without any special power. And besides, the bonds of the company, or its lawful contracts, would entitle the holder to recover upon them, and under the judgment, by the act of 1858, (*Nix. Dig.* 719,*) the whole road and franchises could be sold. The complainant, therefore, cannot be injured by a mortgage, whether valid or not, upon any part of the road.

THE STATE (BAIRD, prosecutor,) vs. BAIRD AND TORREY.†

1. The father is entitled to the custody of his children ; and in no case will the courts take them away from him when he has them in his custody, fairly obtained, except where the father, from notorious grossly immoral conduct or great impurity of life, with which his children come in contact

* *Rev.*, p. 945. † CITED in *Landis v. Landis*, 10 *Vr.* 279.

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so as to be in danger of contamination, is an improper person to have the custody of his own children. Infants under seven years of age are an exception, under the act of March 20th, 1860 (*Pamph. L. 437*).

2. Upon a *habeas corpus* brought by the father for his children, the court will not, as a matter of course, order them to be delivered up to him, but only in case they are improperly restrained of their liberty. The office of the writ is not to recover the possession of the persons detained, but to free them from all illegal restraints upon their liberty.

3. If the infants are of sufficient years or discretion to judge for themselves, they will be examined, and if they are satisfied and wish to remain, the court will hold that they are not unduly deprived of their liberty, and will permit them to go with which of the parties they may elect. When they are too young to exercise any discretion, the court will determine for them, and adjudge the custody to such parent as may be considered most advantageous for the infants.

4. All the children were adjudged to remain in the custody of the mother; the two youngest, because under seven years of age, and the mother a fit person to have the custody of them; the four eldest because, upon examination, they proved not to be restrained by their mother, those capable of making their election preferring to remain with her; and in the case of those not so capable, because it was adjudged to be for their benefit and advantage to be brought up with the others.

Mr. Carpenter and *Mr. Browning*, for complainant.

Mr. F. B. Chetwood and *Mr. Williamson*, for defendants.

THE CHANCELLOR.

A *habeas corpus* was sued out by the relator, James H. Baird, tested April 12th, 1864, to compel his wife, Adeline W. Baird, and her father, William Torrey, the defendants, to produce Adeline T. Baird, then in her thirteenth year, James H. Baird, then in his eleventh year, William T. Baird, then in his ninth year, Robert B. Baird, then in his seventh year, Edward P. Baird, then in his fifth year, and George D. Baird, then in his second year, the six children of said James H. Baird and Adeline W. Baird, his wife. The petition for the writ states that the first five named of said children were taken from the residence of the petitioner in the city of Philadelphia, without his knowledge or consent,

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on the eleventh day of March, 1862, by his wife Adeline, and taken to the residence of her father in this state, and there detained and kept from him, his wife having deserted him without cause; and that the youngest of said children, whom he had never seen, and whose name was unknown to him, was born in this state after the desertion of his wife, who, as the petition alleges, deserted him at that time without cause, and refused to see him.

The return of William Torrey denies that he has the custody of, or detains said children, and states that they are in the custody and charge of their mother, at a dwelling-house in the county of Ocean, where she resides and keeps house by herself.

The defendant, Adeline W. Baird, in her answer and return, produces the six children as commanded by the writ, and shows, as the cause of their detention in her custody, that they are her children, and all of tender and helpless age and require the care and nurture of a mother, and that their father has not the means of maintaining them, and has not made the necessary provision for maintaining her or them for a large portion of her married life. She admits that she left her husband on the day stated in the petition, and took the five children with her, and that she and they have since been maintained by her father.

She adds to this return a detailed history of her married life, stating with great bitterness and acerbity, the particulars of the failure of her husband, who is a clergyman, in his efforts as a preacher and pastor, his unpopularity and dissensions with his congregations, and his great unkindness to her; and charges him with using personal violence to her on three occasions, and with impure conduct with lewd women and with her own female servants, by intrusion into their rooms when they were undressed.

The prosecutor, in his answer to this return, reviews and restates the history of their married life, denies the unkind treatment, explicitly denies the charges of personal violence and of impurity of conduct, and charges that the real cause

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of her final separation from him was his detecting her in what he considers not only highly reprehensible, but criminal conduct, in co-operation with others. This conduct he declines to specify ; but a summary of the charges against him gratuitously appended to the return of William Torrey, and the subsequent evidence in the court, shows that was a charge of attempting to effect abortion while *enceinte* with her youngest child, which her husband supposed she had attempted by the aid of Dr. J. S. Ludlow, her attending physician. He charged her with the attempt, and for it discharged Dr. Ludlow, and would not permit him to continue his attendance on his wife.

Pending these proceedings, the prosecutor, who resides in Pennsylvania, instituted proceedings in the courts of that state for a divorce ; and in March, 1866, the divorce was granted.

A large mass of testimony has been taken on both sides to sustain their respective allegations, each endeavoring to show that the want of harmony and success that pervaded the greater portion of their married life was the fault of the other ; she to maintain her charges of neglect, harshness, personal violence, impure life, and immoral conduct ; he to show that his want of success was in a manner owing to her want of affection for, and co-operation with him, and to the continued interference of her parents ; and that she and Dr. Ludlow were guilty of the attempt to produce abortion.

Much, by far the most, of this evidence has nothing to do with the question before me. And, therefore, before remarking on the evidence, it will be advisable to settle the principles of law on which this case must be determined.

The law that applies to this case, as to the right to the custody of infants, and the power and duty of courts and judges when infants are brought before them on *habeas corpus* to change their custody, is, I think, settled.

The father, at common law, is entitled to the custody of his children ; and in no case will the courts take them away from him when he has them in his custody fairly obtained,

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except where the father, from notorious grossly immoral character or great impurity of life, with which his children come in contact so as to be in danger of contamination, is an improper person to have the custody of his own children.

This is the law of this state, except as to infants under seven years of age, the custody of whom, by the act of March 20th, 1860, is given to the mother if she is not unfit for it, and the courts and judges are bound, on *habeas corpus*, to award it to her.

Upon a *habeas corpus* brought by the father for his children, the court will not, as a matter of course, order them to be delivered up to him, but only in case they are improperly restrained of their liberty. The office of the writ is not to recover the possession of the persons detained, but to free them from all illegal restraints upon their liberty. And therefore, in cases where infant children are not in the custody of improper persons, and are not restrained against their will, they will not, on *habeas corpus*, be delivered to their father. If the infants are of sufficient years or discretion to judge for themselves, they will be examined, and if they are satisfied and wish to remain, the court will hold that they are not unduly deprived of their liberty, and will permit them to go with which of the parties they may elect. When the infants are too young to exercise any discretion, the court will determine for them, and adjudge the custody to such of the parties as may be considered most advantageous to the infants. Such, it must be presumed, would be the choice of the infant had it the capacity to elect, but the custody would in all such cases be given to the father if not an improper person, unless it clearly appears that it is for the advantage of the infant to remain where found.

These principles may be fairly considered as settled by the numerous authorities on the subject, though in some of the applications of them there is conflict. *Forsyth on Custody of Infants* 54; *McPherson on Infants* 152; *Rex v. Smith, Strange* 982; *Rex v. Delaval*, 3 *Burr.* 1434; *Blissett's case*, *Lofft* 748; *State v. Cheeseman*, 2 *South.* 445; *State v.*

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Stigall, 2 Zab. 286; *Mayne v. Baldwin*, 1 Halst. C. R. 454; *Bennet v. Bennet*, 2 Beasley 114; *In re Wollstonecraft*, 4 Johns. C. R. 80; *In re McDowle*, 8 Johns. R. 328; *In re Waldron*, 13 Johns. R. 418; *The People v. Mercein*, 8 Paige 47; *Mercein v. The People*, 25 Wend. 64; *United States v. Green*, 3 Mason 482.

In the case of the *State v. Cheeseman*, 2 South. 445, the court holds that the relator, who was the guardian, was clearly entitled to the custody of the child, a boy between thirteen and fourteen years old, that the guardian had the right to *take* possession of him, and the mother had no right to resist, yet that, as he was not retrained against his will, the court could not, on a *habeas corpus*, the only office of which was to relieve from improper restraint, order him to be delivered to his guardian, and determined "to let the child go where he will."

There can be no doubt then, that the custody of the two younger children, who are under seven years of age, must be awarded to the mother by the express directions of the act of March 20th, 1860, (*Nix. Dig.* 361, § 18,*) unless she be of such character or habits as to render her an improper guardian for them.

There is nothing in the evidence to show that the character or habits of Mrs. Baird are such as to render her an improper guardian for her children. The prosecutor does not so contend. She is a woman of education, refinement, and religious life and principles. The prosecutor does not allege anything against her except her conduct to him in their married life, her attempt at producing abortion, and her untrue and unfounded charges against him. The attempt at abortion is strongly sustained by circumstantial evidence, such, as if not well and strongly answered, would be sufficient to produce conviction of the truth of the charge, but is explicitly denied by Mrs. Baird, and by Dr. Ludlow, a respectable physician, and I am unwilling to believe that they, or either of them, are capable of committing plain and direct perjury. And even were I compelled to the conclusion

* *Rev.*, p. 485, sec. 21

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that she had made the attempt, although the crime is a grave one, not to be justified or excused, I do not think it sufficient of itself to show that she is an improper guardian for her children. It is easy to conceive that a woman of a weak, nervous, and shattered physical frame, who has been enfeebled by years of discomfort, agitation, and misery, in her dread of undergoing again the first part of the curse on Eve, especially when it is not mitigated by the second part, affection for, and subjection to, her husband, may, without being totally demoralized, be tempted to try and avoid it by this crime. She may still be a kind, true, and affectionate mother to her children, and even more capable, and more likely to discharge her duties, than one more cold and phlegmatic, who could endure with stoical composure the protracted sufferings of gestation and parturition. And Mrs. Baird, by the aid given by her father, is able to bring up and educate these children properly, and with comfort. I can leave them in her charge, in full confidence that so long as she lives and remains in her present circumstances, they will be properly cared for and trained.

The father is, by law, entitled to the custody of the four other children, unless his character is such as to render him an improper guardian. For this purpose the charges and evidence relating to his moral character are relevant, and must be considered.

The principal charges against him are, that his conduct was immoral and impure with regard to women; that he was in the habit of conversing and walking with lewd women in the streets, and going to houses of ill-fame; that his conduct towards the female servants was indecent; that he was in the habit of intruding himself into their rooms at night when they were undressed. It is neither necessary nor proper that I should recapitulate the testimony on these charges. There is no testimony to sustain them, that can be considered as entitled to any credit. And this is not all; but these charges, considered in connection with the proofs on which they are based, and by which they are attempted to be sustained, do

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no credit to Mrs. Baird; they are unworthy of her. They show a morbid aversion to her husband and the father of her children so intense as to overcome, as regards him, her sense of justice and propriety, which I do not doubt she possesses in a high degree, both by nature and education. The consideration of this matter is not gratuitous or uncalled for, because in exercising any discretion I may have with regard to the custody of these children, the fact that she may not be able to refrain from instilling into their minds a like aversion to their father, may be an important element for consideration.

The charges of personal violence to herself are next in importance, as they may show a cruel and brutal disposition, or ungovernable temper, that may make him an unfit custodian to rear children of tender years, when untempered by a mother's kindness. Three instances are specified in her charges, four in the proofs. They are substantially denied by Mr. Baird, in his answer and testimony. There is nothing in the case to affect his character for truth. On the contrary, he appears to be a man of high regard for right and duty. If these scenes had occurred in the manner stated, he must recollect them; his denial would be an untruth. Excited feelings may have led her to exaggerate, without meaning to violate the truth. I cannot believe that these matters occurred *in the manner* related by her, and in some of them the manner is the whole essence of the charge, as regards the object for which they are relevant to this question. I am forced to conclude that the feelings of Mrs. Baird have so controlled and perverted her recollection as to magnify trifles, or matters of little significance, into serious injuries. The question here is not whether, in these cases, there were technical, unjustifiable assaults. The law regarding the power of the husband over a wife has much changed since the age when the limitation most absurdly attributed to Lord Hale is said to have been laid down. No physical force or restraint would now be justified at law among any class, unless necessary for the safety of the wife, or the protection due to her from her husband. He may well restrain her from

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striking her infant child with a deadly weapon, or from throwing herself from a window, by all the force necessary to effect the object; so might any stranger; but a husband would be bound by duty to do so. Whether placing his hand on her mouth to stop violent and excited language imprudently indulged in, or taking her from a room where she was, in his opinion, unwisely making excited denunciations that could not be recalled, by placing his arm around her waist or his hands against her shoulders, would in any case be considered justifiable at law, it is not necessary here to determine. But such things may be done under circumstances that would not, in this court, sustain a charge of extreme cruelty, or show that such husband was an unfit custodian of his children, and that even where the prudence or necessity of the interference should not be justified. I do not believe that more was done by Mr. Baird on these occasions, than might be excused on such grounds. And in stating that I do not believe these charges to the extent to which they are made by Mrs. Baird, I do not charge her with willfully making false accusations against him; but I am convinced that her feelings on this subject are so excited and intensified that, without intending it, her imagination affects her recollection of facts that really occurred. It evidently does to a great extent in her narration of the history of her married life, which I must consider for this purpose, if for no other in the cause.

Under the head of cruel treatment may be ranged the charge made against her, of attempting to produce abortion, which, if untruly made, without grounds of suspicion to warrant it, would be very cruel treatment. I have already given my views of the evidence by which this charge was supported. To say here that the facts would justify the suspicion, and the making of the charge made by him, would very inadequately express my opinion. Without contradiction by respectable witnesses under oath, (which Mr. Baird had not) the facts before him must have carried conviction. And even with that contradiction, a court of law would hardly set aside

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a verdict founded on the evidence upon which he acted. There is nothing against him in this charge.

The other matters involved in the evidence, can have little or no effect on the determination of the question here. It is not necessary for me to determine which was in fault, or most to blame for the many difficulties and disagreements that for years attended their life, and ended in their separation and final divorce. The questions that arise in such investigation, so far as contained in the evidence, would have little to do with the determination of the question to be decided here, as to the fact whether either is an improper guardian for these children.

I am clearly of opinion, from the whole evidence, that there is nothing before me by which I can hold that either is not a fit and proper custodian of those children which the law commits to him or her. The children under seven must remain with the mother. If the children over that age were now in the custody of the father, I could not deprive him of it on *habeas corpus*.

But the four children above that age, upon an examination, have satisfied me that they are not restrained by their mother against their will, and that they desire to remain with her. So far as they are of capacity to make that declaration, upon the principles laid down as the law of the case, they cannot be taken from their mother upon *habeas corpus*, but must be allowed to go with her if they choose. As to those not capable of making that selection, the presumption is that they choose the custody which, all things considered, is most for their benefit. And which custody is most for their benefit must be determined by the court.

Mrs. Baird has an adequate support and a comfortable home furnished for herself and children by her father and friends, is a woman of education and intelligence, of refinement and feeling, and of unexceptional moral and religious character. She may have had a strong and even unjustifiable aversion to her husband, without affecting her character in these respects, or making her less competent to educate

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her children ; for differences in development and organization may render a life together, insufferable to two persons, without moral fault in either. And as the custody of the elder and younger children is with the mother, it is an advantage and benefit for the children to be educated and brought up together, that cannot be overlooked. I shall therefore determine that it is for the benefit of these children to remain with the mother. I will so determine upon a careful consideration of the whole case, including the possibility of their imbibing from her, her aversion to their father, which has given me more difficulty in doing so than any other matter.

This view makes it unnecessary for me to determine whether William is of sufficient age or capacity to choose for himself. There is no absolute rule on this subject ; and at his age, twelve years, there might be a question. But if he is of sufficient capacity he has chosen, and if he is not, the court has determined his choice for him, in the same way.

Of course, in such case, the father must be allowed to visit his children at proper times, and under proper limitations. These, if not agreed on, will be fixed by the court. And this must be allowed on the condition that he shall not use these visits to deprive the mother of the custody of these children either by persuasion or force.*

 PORCH and others *vs.* FRIES and others.†

1. The power of a guardian over the person and property of an infant ceases at her marriage. From that time such guardianship devolves upon the husband. He can enter upon her property, and permit others to enter upon it, without committing a trespass ; he can also make leases voidable by her upon his death, or by his heirs at her death.

2. An acknowledgment by a married infant is void.

* By the decree of the Court of Appeals, the two youngest children were adjudged to remain with their mother, and the eldest if she so desired ; the other three children to be delivered into the custody of their father.—6 *C. E. Gr.* 384.

† CITED in *Vreeland's Ex'r v. Ryno's Ex'r*, 11 *C. E. Gr.* 162 ; *State v. Hulick*, 4 *Vr.* 310.

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3. The husband of a married infant cannot sell or dispose of the growing wood or timber on the real estate of his wife.

4. The deed of a married infant is void when it attempts to convey the wood and timber separately, as when it attempts to convey the soil with them standing upon it.

5. By the married women's act (*Nix. Dig.* 503,) in cases coming within the provisions of that act, the husband has, during her life, no interest or estate in the lands of his wife. She can sell them with his assent, and if she so sells and conveys them, she conveys them free from any interest or estate of her husband.

6. That act destroyed the estate of tenancy by the curtesy initiate.

7. The married women's act, although inconsistent with the estate by curtesy initiate, does not defeat the husband's curtesy at the death of the wife, provided she has not aliened her estate before. The act only protects her estate during her life; it does not, at her death, affect the law of succession as to real or personal estate.

8. Neither a husband nor his lessees may commit waste upon lands in which he has only an estate by the curtesy.

9. A lease made by the husband of a married infant of her lands, becomes valid for his life, by the vesting of the estate by curtesy; and the heirs-at-law, being entitled to the reversion, have such privity of estate as will enable them to call the life tenant and his lessees to account for wood and timber cut, as well during the life, as after the death of the infant.

10. Where the husband of a married infant permits the felling of trees upon her lands, or severing any part of her realty, and so the change of the real to personal property for his own benefit, it will retain its character of real property so as to pass to those who would have been entitled to it if not severed.

11. The heirs-at-law are entitled to an account for so much of the timber as has been taken away, and an injunction to restrain the removal of so much as still remains on the land.

This cause was argued upon a motion to dissolve the injunction which issued upon the filing of the bill.

Mr. Nixon and *Mr. Browning*, in support of the motion.

Mr. J. Wilson and *Mr. Bradley*, contra.

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THE CHANCELLOR.

The defendant, Samuel F. Fries, on the thirty-first of July, 1861, was married to Martha Porch, then sixteen years old. On the thirteenth of June, 1866, she gave birth to a son, who lived for a few hours, and she died on the twentieth of that month, a few weeks under twenty-one, without having had any other child. At her marriage she was seized in fee of several tracts of land; and several other tracts descended to her in fee by the death of her brother, William Porch, who died in June, 1864, intestate and without issue, leaving her his only heir-at-law. In November, 1864, S. F. Fries and his wife, Martha, made two leases to the defendants, John M. Moore and David Wilson Moore, by which they demised, for ten years, some of the tracts of which she was seized at her marriage, and some of the tracts which she inherited from her brother William, with the privilege of cutting off all the wood and timber. These tracts consisted chiefly of wood and timber land, of which the wood and timber were the principal value. The considerations of these leases were the sums of eight thousand dollars and two thousand eight hundred dollars respectively, which were paid in cash to Fries, by the lessees. One tract, known as the one hundred and thirteen acre tract, had on it very young thrifty cedar timber, which could not be cut within the term to advantage; this tract, shortly after the lease, Fries and his wife conveyed to the defendants, J. M. and D. W. Moore, in fee, by a deed duly executed by both, and acknowledged by Mrs. Fries, as required by law for married women. The defendants, J. M. and D. W. Moore, acting upon these leases, cut and carried away large quantities of the wood and timber standing on these tracts; and, during the last illness of Mrs. Fries, after her recovery was despaired of, being advised that their right to cut might terminate with her life, and that they would be entitled to all wood and timber felled before her death, directed all the men employed by them to confine themselves to felling wood and timber, without cutting it up, or prepar-

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ing it for use, that the greatest possible quantity might be felled upon her death. They continued felling after her death, until stopped by the injunction issued in this cause on the seventh day of July last.

The complainants are the heirs-at-law of Martha Fries. They filed their bill against the defendants, to restrain the further cutting of wood and timber, and the removing that already cut, and for an account of what had been taken away. The bill alleges that Martha Fries died without having had issue born alive, and that the defendant, Fries, had no curtesy, or estate whatever, in the premises. The answer, which to this is responsive, states that she had a child that was born alive and lived several hours, and is supported on this point by several affidavits annexed to it. But on this motion, the answer as to this matter is conclusive.

Martha Porch, at her marriage, had a guardian of her person and property, appointed by the Orphans Court; his power ceased by her marriage, it being incompatible with the rights of her husband. *McPherson on Infants* 90; *Mendes v. Mendes*, 1 *Ves., sen.*, 91.

From the marriage, her husband was in the place of her guardian, in the case of herself and her property. He could enter upon her property, and permit others to enter, without committing a trespass; he could, like a guardian, make leases, which at common law were not void, but voidable by her upon his death, or by her heirs at her death; and perhaps, since the married women's act, they could be avoided by her before his death, upon her coming of age. In England, by statute, guardians were permitted to make leases on certain conditions, that would be valid after her majority. 2 *Kent* 130; *Van Doren v. Everitt*, 2 *South.* 460; *Snook v. Sutton*, 5 *Halst. R.* 133; *Clancy's Rights of Married Women* 168, 170.

But the leases and deed of Mrs. Fries were void. She was both an infant and *feme covert*, and her acknowledgment, by the very terms of the act authorizing acknowledgments, was

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of no effect. *Nix. Dig.* 131, § 4.* And both the opinion and decision in the Supreme Court and Court of Errors, in this state, in *Ross v. Adams*, 4 *Dutcher* 160, and 1 *Vroom* 505, are upon the ground that a mortgage executed by Mrs. Adams, while under age, jointly with her husband, to Ross, although acknowledged in due form, was void. In both courts, the interest of the money was adjudged to her for her life. *Sandford v. McLean*, 3 *Paige* 117; *Stamper v. Barker*, 5 *Madd.* 157.

The growing wood and timber on these lands were part of the realty, and the right to it is an interest in the land, which the guardian of an infant, or the husband of a married infant cannot, as her guardian, sell or dispose of. The courts, in certain cases, are authorized to direct either the land, or the wood and timber, to be sold by the guardian. And the deed of a married infant is void when it attempts to convey the wood and timber separately, as when it attempts to convey the soil with them standing upon it. *Liford's case*, 11 *Rep.* 46; *Green v. Armstrong*, 1 *Denio* 550; *McIntyre v. Barnard*, 1 *Sandf. C. R.* 52.

By the married women's act of March 25th, 1852, (*Nix. Dig.* 503),† in cases coming within the provisions of that act, the husband has, during her life, no interest or estate in the lands of his wife. She holds them to her separate use as if she were a *feme sole*, free from his control. She can sell them with his assent, and if she so sells and conveys them, she conveys them as she holds them, free from any interest or estate of her husband.

At common law, the death of the wife was necessary to the estate by curtesy. It is one of the four requisites laid down in the authorities on the subject. But upon the birth of a child, another anomalous estate was created, called tenancy by the curtesy initiate. It was the increasing the estate for their joint lives, which he held before in his wife's lands, into an estate for his own life. The married women's act, as it prevented his acquiring any interest in his wife's estate during her life, destroyed the estate of tenancy by the

* *Rev.*, p. 154, sec. 9. † *Rev.*, p. 636.

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curtesy initiate. *Thurber v. Townsend*, 22 N. Y. Rep. 517; *Billings v. Baker*, 28 Barb. 343; *Hurd v. Cass*, 9 Barb. 366; *Sleight v. Read*, 18 Barb. 169; *Ross v. Adams*, 4 Dutcher 160.

The better opinion, and the weight of authority, is that this act, although inconsistent with the estate by curtesy initiate, does not defeat the husband's curtesy at the death of the wife, provided she has not aliened her estate before. The act only protects her estate during her life; it does not, at her death, affect the law of succession as to real or personal estate. *Ross v. Adams*, 4 Dutcher 160; *Naylor v. Field*, 5 Dutcher 292; *Van Note v. Downey*, 4 Dutcher 219; *Hurd v. Cass*, 9 Barb. 366; *Clark v. Clark*, 24 Barb. 581; *Val-lance v. Bausch*, 28 Barb. 642; *Morgan v. Morgan*, 5 Madd. 248.

The only authority to the contrary that I find, is in the reasoning and two opinions of Potter, J., in the case of *Billings v. Baker*, 28 Barb. 343. This point was not that on which the decision turned. The question was on a motion in a partition suit, to strike out the name of the husband of one of the tenants in common. It turned on the question whether the husband had, in the life of his wife, any interest in the lands such as to make him a proper party to a bill in partition. Three of the four judges concurred, Potter being one, that he had no such interest. Which opinion is doubtless correct. But the case does not show whether they concurred in his views as to the husband's title to curtesy at the death of his wife, a question not there raised.

The effect of these views upon the present case is, that Fries, as husband, had no estate in his wife's lands during her life, and that, upon her death, he became entitled to a life estate in the whole, as tenant by the curtesy. The view that I shall take of the case will render it immaterial to consider the question raised here and elsewhere, and not yet settled in this state, upon the construction of the third section of the married women's act, whether she is thereby authorized to hold all her estates to her separate use as a *feme sole*, or only those acquired in the manner specified in that section.

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As an estate by the curtesy is only an estate for life, the husband or his lessees are not entitled to commit waste. And cutting off all the wood and timber standing on lands is clearly waste. Upon the final hearing of the case, it may appear that some part of this wood and timber may be cut in the usual course of enjoyment of such land, and without impairing its value, but at this stage of the case the injunction against all further cutting must stand.

So also as to the wood and timber cut since the death of Martha Fries, and now upon the land; that must be accounted for, and the injunction must remain. The lease from Fries, whether valid in the life of his wife or not, became valid for his life by the vesting of the estate by curtesy; and the heirs-at-law, being entitled to the reversion, have such privity of estate as will enable them to call the life tenant and his sub-tenants to account for waste. They were not trespassers.

The question as to the timber cut during her life is a more difficult one. The settled rule is that when timber is felled by trespassers, it vests as personal property in the owner of the fee, and at his death goes to his personal representatives, not to his heirs; and the same result follows when it is cut by a tenant for life or less estate, it vests as personal property in the reversioner. *Bewick v. Whitfield*, 3 P. W. 267.

This rule would clearly have vested the title to all wood cut in the life of Mrs. Fries in her, as personal property, and at her death it would go to her husband, by his marital right. It would be the same whether the Moores were there as trespassers, or under a lease valid to give possession until avoided.

But in this case the leases were valid to give the possession until avoided, and they were not avoided in the lifetime of Mrs. Fries; in fact, they are valid yet to give possession of the lands, for which only they were valid in her life; they gave no right to cut wood or timber. The waste then, was committed by the husband and quasi-guardian of an infant's estate, and those acting under him, without her legal consent, and there-

fore against her will. The effect of it was, and no doubt in this case the object and design of it was, to convert real estate into personal, and change the descent of it at her death, for the benefit of the husband, and to the injury of her and her heirs. In her life she could have no remedy against her husband, at least before the married women's act, nor could her heirs. Under these circumstances, it would be inequitable and against conscience to allow a husband, while he stood in the place of a guardian to protect her property, to profit by such a breach of trust and confidence, and to change the nature of the property for his own advantage, in a manner that his wife was, by law, unable to do by parol, deed, or will.

Accordingly, courts of equity, always averse to allowing the property of infants to be changed from real to personal, or the reverse, have held, where the person entrusted with the possession or custody of the property is the one who is benefited by the change, that felling trees, or severing any part of the realty, does not change it from real to personal property for his benefit, but that it retains its character of real property, so as to pass to the same persons who would have been entitled to it if not severed.

This was so held by Sir Thomas Clark, in *Tullit v. Tullit*, reported in *Ambler* 370. In that case, timber was cut by the mother and guardian of an infant owner of the fee. She was ordered to account, and the money was invested to attend the inheritance. The same was held in *Mason v. Mason*, referred to in that case from *Lib. Reg.* in 1724. So also in the case of *Williams v. Bolton*, referred to in a note to 3 *P. W.* 268, and decided in 1784. *Tullit v. Tullit* was a leading case, and has been followed since in the English Court of Chancery. *Powlett v. Duchess of Bolton*, 3 *Ves.* 274; *Ware v. Polhill*, 11 *Ves.* 278. Justice Story, in 2 *Eq. Jur.*, § 1357, lays it down as the settled rule of the court.

This doctrine accords with the provisions of the statutes of this state. The act of 1855, relating to abatement of actions, (*Nix. Dig.* 4, § 15,*) gives to the executors and ad-

* *Rev.*, p. 396, sec. 4.

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ministrators, actions for *trespass* done to the real property of the decedent in his life ; and the act for the prevention of waste (*Nix. Dig.* 908, § 6,*) expressly enacts, that every heir shall recover “for waste and destruction made in houses, lands, or tenements, of his or her inheritance, as well in the time of his or her ancestor, as at any other time after the inheritance descended or come to him or her.” Whether, by the construction of the third section of the married women’s act, Fries had, in the life of his wife, an estate in her land, or only had its control as her husband or quasi-guardian, he was in possession by right, and is accountable for waste, and was not a mere trespasser. All timber cut by him or his tenants, the Moores, during the life of his wife, retained its quality of real estate, and descended to the complainants. For what the defendants have taken away they must account, and the injunction must be retained as to the part on the premises.

The motion to dissolve must be denied.

BRANNIN vs. BRANNIN.

1. The statute of frauds is not a good defence in the case of a resulting trust arising by implication of law, or of actual fraud.

2. When a defendant in execution, or the heirs of a decedent, rely on the promise of some one to buy the property for their benefit at the sale under the execution, and in consequence neglect to attend the sale, or bid for the property, and the person trusted buys for his own benefit, a court of equity will hold such purchaser a trustee, notwithstanding the statute of frauds.

3. The application of the principle cannot be invoked in this case.

Mr. R. S. Green and *Mr. Williamson*, for complainants.

Mr. W. J. Magie, for defendant.

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THE CHANCELLOR.

The complainants in this suit are Eliza Brannin, widow of Patrick Brannin, deceased, and James Brannin, the infant son and only heir of Patrick. The defendant is Thomas Brannin, a brother of Patrick. The real estate of Patrick Brannin, who died in the year 1857, situate in the city of Elizabeth, was sold on the eighteenth of August, 1857, by his administrator, James Hughes, to the defendant, under a decree of the Orphans Court, for the payment of the debts of the deceased. The complainants allege in their bill, that the sale was made to him in trust for them; that the whole proceedings were got up under an agreement between him and the complainant, Eliza, that this course should be taken so that the title might be vested in him for the benefit of herself and son, and that the defendant never paid any money for the property. And they allege that, in consequence of this understanding, the property was struck off to him at a price much below its real value; that it was struck off for fifteen hundred dollars, when it was really worth over two thousand dollars.

The defendant, in his answer, fully denies that there was any such agreement or understanding as that alleged; and says that the property was sold at its full, fair value, and that he paid the full amount of the purchase money to the administrator, James Hughes, and states fully how it was paid; part being paid by assuming and paying a mortgage then on the property, part by paying by his notes the cash debts of the deceased, and the residue by giving to the administrator a bond secured by mortgage on the property. He sets up as a defence the statute of frauds, which enacts that no trust shall be created except by writing.

The bill charges that two of the debts for which the land was ordered to be sold were fictitious debts, got up for the purpose of transferring the title to the defendant; one a debt of three hundred dollars to the defendant, and the other a debt of one hundred dollars to his brother, Owen Brannin.

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The answer states that these were not fictitious debts, but were really owing to both, for work and money lent by them to the intestate, and were acknowledged by him.

The statute of frauds set up is a good defence, except in two cases; one of a resulting trust arising by implication of law, which this clearly is not, and the other in case of actual fraud. And the case, where a defendant in execution, or the heirs of a decedent, rely on the promise of some one to buy the property for their benefit, and, in consequence, neglect to attend the sale, or bid for the property, and the person trusted buys for his own benefit, is such a case of fraud that a court of equity will hold such purchaser a trustee, notwithstanding the statute of frauds.

In this case, any agreement to purchase for the benefit of, or as trustee for the complainants, is denied by the answer, and is not proved by any witness. The testimony of the complainant, Eliza Brannin, does not prove any definite or positive agreement that would make the purchase by defendant for his own use a fraud. Her testimony shows that, according to her understanding, he was to hold the title, that she could have a home for herself and children, and when in better times it could be sold for its value, they would among them have the benefit of the proceeds. She was not prevented from buying; she did not intend to buy; she had no means. There is no other evidence to overcome the positive responsive denial of the answer, that there was no agreement or understanding that defendant should buy for the use of the complainants, or in trust for them.

There is no actual or constructive fraud proved in the sale by any of the evidence. The weight of the evidence is that the property brought its full value. And this is a complete answer to the charge that defendant procured Hughes to administer that he might get the property by fraud; and to the charge of keeping purchasers from the sale. His course of proceeding was advised by respectable counsel, and if carried out without actual fraud, was prudent and unobjectionable. If these debts of the intestate were owing, they were

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paid without sacrifice of the property, and with no unnecessary expense. That the defendant got the creditors to take his notes for their debts was no injury to any one, and is surely no fraud upon the complainants. The fact that neither the deed of the administrator, nor the mortgage to him was recorded, is sufficiently accounted for. The claim of the defendant that the intestate owed him three hundred dollars, I think is surrounded by many suspicious circumstances. I strongly suspect that, had the intestate lived, no such claim would have been presented to him. Yet it may be correct, and legally as well as justly due. It is fully sworn to in the answer, and there is no evidence to disprove it. The administrator admitted it, and if it was not due, the sureties of the administrator, who has rendered no account, are liable for it.

These views of the case will, of course, compel me to order that the bill be dismissed.

But there are many circumstances that justify the widow, for herself and infant child, in this proceeding to investigate the case, and counsel in advising that course. The conduct of the defendant in not paying the mortgage, or the balance of the consideration of the property, long since due, has in some measure caused this. I shall not, therefore, order the complainants to pay costs.

THE MORRIS CANAL AND BANKING COMPANY *vs.* FAGAN
and others.

1. In general, a trespass will not be restrained by injunction. But where the trespass is an obstruction to a public highway, entitled to be used by all citizens, it is a nuisance of a character which this court will prevent by injunction.

2. The denial of the answer being fully responsive to the allegations of the bill and supported by the affidavits, injunction dissolved.

The Morris Canal and Banking Company *v.* Fagan.

Mr. C. Parker and *Mr. Dyett*, in support of the motion.

Mr. J. F. Randolph and *Mr. Vanatta*, contra.

THE CHANCELLOR.

The injunction in this case was to restrain the defendants from driving piles, or placing other obstructions on the premises claimed by the complainants, in the city of Newark, known as the Cory lot, within forty-eight feet of the wall on the southeast side of their canal. Those premises are alleged in the bill to be part of the lands surveyed and taken by the complainants for the construction of their canal, and on which it was built; the width of the canal and its embankments there, being claimed to be forty-nine feet ten inches, and it being averred that Jonathan Cory, the owner at that time, had conveyed this land by a deed now lost, and that the complainants had been in the exclusive possession for more than twenty years.

In general, an injunction will not be issued to restrain a trespass. But this canal and its tow-path constitute a public highway, which all citizens are entitled to use; an obstruction is a nuisance, and one of the character proper to be prevented by injunction; and the complainants being the owners of the work, and obliged to keep it in good order, are the proper persons to apply for the injunction.

The grounds on which the injunction was granted were, that the place where the piles were being driven was part of the canal or its tow-path, that the canal was located by survey upon these lands of the width of forty-nine feet ten inches, and that the complainants have been in exclusive possession of it for over twenty years. These facts are averred in the bill, and to some extent sustained by the affidavits annexed to it. The bill sets forth an agreement between the complainants and Jonathan Cory, who then owned the lands now owned by the defendants, and through which the canal was laid out, by which they agreed that he might build and maintain a basin on the side of the canal at

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this place, and might, for that purpose, take down the bank of the canal; he to pay them one thousand dollars for the privilege, and to allow them to use the basin for their own boats.

The answer admits that the complainants surveyed, and filed in Essex county clerk's office a field book of a route of their canal through Cory's land, but denies that the canal was constructed on said route, or through Cory's land, except in River street, in front of his land, where he might have owned the soil. It denies that Cory ever conveyed the land to them, or that they have ever had exclusive possession of the premises on which they are driving their piles, or that it extended over these premises; alleging that the canal was constructed on a public street in Newark, called River street, and that the canal and its tow-path did not in fact exceed thirty-two feet in width, to which width it was confined by law; that it never had any tow-path on its northeast side at this place, and that its northeast side was three feet within the northwest line of River street, on which three feet the piles in question are being driven.

The allegations of the bill as to the survey of the route of the canal through Cory's lands, are not distinct and definite, and they are not supported by any proof annexed or exhibited. The answer on this point is responsive, and by that and the affidavits annexed in support of it, it is apparent that in 1828 there was a survey and field book of the lands of Jonathan Cory, needed for the construction of the canal, filed by the complainants as required by the sixth section of their charter. The land so designated, as clearly appears by the map so filed, and by the affidavits, was some seventy feet northeast of River street, on Cory's land. It appears by the affidavits of James H. Terhune, Horace J. Poinier, and Aaron Gill, that the canal was actually built within the lines of River street, and not on the lands described in the map and field book filed. This also appears by the affidavit of Peter Weitzel, surveyor, and the maps made by him and exhibited. The complainants filed this field book because Cory would

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not convey these lands, and they could not agree with him. In no other case were the proceedings, so commenced, authorized by their charter. After they were authorized by the second section of the act of 1828 to construct the canal in public highways, they could, by taking part of River street, avoid paying Cory for his land, and they abandoned their route filed in the clerk's office, and constructed the canal in River street. Here they could only occupy thirty-two feet, and were not entitled to extend their claim by construction from a survey filed, to forty-nine feet ten inches.

The description of the basin of Cory, as contained in the agreement with him and in his letter to R. Gilchrist, of May 13th, 1831, confirms this view of the location of the canal. The basin is described as extending to the canal, at the distance of three hundred and sixty feet from the river. At this time the canal was just finished, its sides were well defined, and the maps and measurement of the surveyor show that this distance extended to the northeast side of the canal, and within the northeast line of River street. I must therefore regard the claim by survey and field book, as disposed of by the responsive denials of the answer, supported by the affidavits annexed to it.

The bill alleges that the defendants were extending their aggressions still further *into the canal* on the complainants' property, which has been in their possession for more than thirty years. The affidavits of W. H. Talcott, the engineer and president, and of Unangst and Baker, the supervisors, state that for more than twenty years the company had claimed to own, and had exercised exclusive jurisdiction over forty-eight feet from the opposite wall of the canal; they do not say the company had possession, or exclusive or adverse possession of it. The term jurisdiction, applied to a corporation, is ambiguous.

They do not state any act or series of acts of ownership, or deny that the defendants, and those under whom they claim, were in possession, or exercised acts of ownership. The place in question was a basin, part of Cory's basin, made

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on his own land, and during the period of navigation, covered by water. The agreement with Cory admits that the land was his to the canal, for the length of two hundred and forty feet. The complainants, by that agreement, had the right to use it for their own boats; all such use was subservient to Cory's title, and while using the basin under that easement so granted, no adverse possession short of an actual eviction and barring out Cory or his assigns for twenty years could gain adverse title, even if it could be gained by these means. The affidavits to the bill do not show such ouster.

The affidavit of David Ripley is annexed to the answer, in support of the denial that the complainants ever owned, or claimed to own any property between the canal at Cory's basin and the river. He shows that he was in possession of the basin from 1845 until the defendants bought of the New Jersey Railroad in 1866, and that he occupied it with logs, and put a boom across the mouth of the basin to separate it from the canal. He denies that he ever paid rent or any compensation to the complainants for the use of the basin, but shows that he hired it from the New Jersey Railroad Company and their tenant, William Jackson.

This is a full and complete denial of the title alleged in the bill to have been acquired by possession; it supports the responsive allegations of the answer. The injunction, therefore, cannot be sustained by the allegation of title by possession.

The complainants undoubtedly could acquire title to lands adjoining their canal, when constructed on a street, by virtue of the act of 1828, although such lands should, with the canal and its tow-path, exceed the width of thirty-two feet. The restriction of the act is only as to the width of the location of the canal and tow-path, when laid in a street. But such additional width must be acquired by deed, or adverse possession; it cannot be had by location or condemnation.

The injunction must be dissolved on the ground that the allegations of the bill, on which it was granted, are fully denied by the answer and the affidavits annexed to support it.

Suffern and Galloway v. Butler.

SUFFERN and GALLOWAY vs. BUTLER and BUTLER.

1. It is material to the execution of an instrument by an illiterate person, that it be correctly read to him.
2. Where the facts upon which the equity of the bill depends, are positively denied by the answer, the injunction will generally be dissolved.

The complainants have filed their bill for an injunction to restrain the defendants from preventing or hindering their entering upon certain lands described in their bill of complaint, for the purpose of pumping water out of a mine thereon, and ascertaining the extent and value of said mine, and of searching for minerals, &c.; claiming the right thereto, under and by virtue of a certain lease set out in their said bill.

The complainants first set out a lease from the defendants to Wanamaker and Hussey, of the said lands, for the purpose of mining, &c., for a period of forty years, the defendants to receive ten per cent. of the net profits; but if no mineral or fossil be mined or quarried for forty years from the date of the lease, then the same to be void. They then set out an agreement made shortly after said lease, but of the same date, giving to Wanamaker and Hussey the right to purchase the fee simple of said lands, at the expiration of two years, for the sum of \$10,000, in lieu of the ten per cent. agreed upon in said lease; the said defendants agreeing to give them a good deed therefor. They allege that the said Wanamaker and Hussey, after the lapse of the said two years, elected to pay the said royalty of ten per cent. of the net profits, and not to take a deed for the lands, and that the said defendants assented to such election, and permitted the said Wanamaker and Hussey to sell to the complainants their said lease and mining interests, without disputing their right thereto. And they insist that by their acquiescence in such sale, the defendants are estopped from denying the validity of said lease in the complainants' hands. They further allege that the said

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Wanamaker and Hussey sunk shafts, and opened an iron mine on said land, with the approbation of said defendants. That after the sale to the complainants of said lease and the rights under the same, the said mine became filled with water, and they entered into an agreement with a practical miner and geologist to have the water pumped out of said mine, and the extent and value of the same ascertained and developed. That upon the attempt by the said miner and his assistants to carry out the agreement so entered into with him as aforesaid, by the said complainants, the said defendants refused to allow them to go on the land for the purposes aforesaid, and threatened to prosecute them as trespassers, denying to the complainants the right to enter upon said lands, or any part of them, for the purposes aforesaid.

The defendants admit the execution by them of a lease to Wanamaker and Hussey, but deny that it was of such purport and effect as set out in the complainant's bill. They say that they can neither read nor write, and relying upon the long and oft-asserted friendship of Wanamaker, they admit that they did sign a lease drawn by Wanamaker, which said Wanamaker read, but as read by him, they charge that the lease was this: that the said Wanamaker and Hussey were to pay them ten per cent. of the net profits of said mines, and if they were not satisfied with that, then, at the end of two years, Wanamaker and Hussey should pay them \$10,000, and take a deed for the property, or else should deliver up the lease to them; that in reading said paper the said Wanamaker did not mention the period of forty years, but if there was any such clause in the lease, he purposely omitted to read it, and if it had been read, they never would have signed the same. They deny that Wanamaker and Hussey were, by said lease or agreement, to have the option to pay the said sum of \$10,000 and take a fee simple deed for said lands, or not, as they should elect. And they allege that at the end of the said two years, they demanded the said \$10,000, but that the said Wanamaker and Hussey refused to pay the same, and take a conveyance of said property. They deny that

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Wanamaker and Hussey, or either of them, informed them, or either of them, that they did not elect to pay the said \$10,000, and take the said conveyance; or that they assented to any such election. They admit that they refused to allow the agents of the complainants to go upon said lands, and deny the complainants' right to go thereon, for that the said lease to the complainants is null and void, by reason of Wanamaker and Hussey having refused to pay the said sum of \$10,000, and take a conveyance of the said lands, in consequence whereof, neither they, nor their assignees, have any right upon said lands.

Such other allegations of the bill as were material to the complainants' case, were denied by the defendants, and their denial supported by the affidavits annexed to the answer. The defendants now move to dissolve.

Mr. Van Blarcom and *Mr. A. S. Pennington*, in support of the motion.

Mr. Wortendyke and *Mr. Ransom*, contra.

THE CHANCELLOR.

The right to dig and explore upon the lands of defendants for ore, sought to be protected by the injunction in this case, depends upon a lease alleged to have been executed by the defendant, William Butler. The execution and contents of that lease are alleged in the bill. The answer of Butler, which in this respect is responsive, denies that he executed such a lease. He cannot read, and in his case the reading of the lease correctly, is as material to the execution of it as making his mark. He denies, in his answer, that the lease as read to him, extended beyond two years.

The positive denial by the answer, of the facts on which the equity of the bill depends, is in general sufficient to dissolve the injunction. In this case there is no reason to make it an exception.

The injunction must be dissolved.

Voorhees v. Voorhees' Executor.

VOORHEES vs. VOORHEES' EXECUTOR.*

1. Where the cause is heard upon bill, answer, and replication, all the allegations of the answer responsive to the complainant's bill, must be taken as true; all other allegations set up in the answer by way of defence or avoidance, not amounting to a denial of the statements of the bill, denied by the replication, and not proved by the party setting them up, can have no effect on the decision.

2. Where a legacy is left to A. for life, with remainder over to his children, a debt due from A. to the testator cannot be set off against the principal of the trust fund. The whole must be invested for the benefit of the tenants in remainder.

3. Where an executor holds the notes of his testator's legatee, although they cannot be offset against the interest due such legatee, yet a court of equity would allow them to be used in payment of the interest during his life.

4. An account settled in the Orphans Court, and within the jurisdiction of that court, cannot be inquired into in a collateral suit in this court.

Mr. Dutcher, for complainants.

Mr. R. Allen, jun., for defendants.

THE CHANCELLOR.

William Voorhees, deceased, by his last will, dated August 22d, 1854, gave to his wife, for life, the use of a house and furniture, and the interest of one thousand dollars. He gave a house and lot to his daughter Rachel and her children. Of the residue of his property, including the property left to his wife for her life, he gave one equal tenth part to each of his ten other children, adding this clause: "The legacies of my sons Gilbert, Joseph, John, Josiah, and William, I entail; they to receive the interest during their lives, and after their decease, to their children. I further order my executors to pay the legacies that I left in fee simple to my children, to be paid in one year after my decease. The legacies I entailed to my five sons, I order my executors to put these legacies at interest, on bond and mortgage on real estate, and they to receive the interest during their lives, from my executors."

* CITED in *Brokaw v. Hudson's Ex'rs*, 12 C. E. Gr. 136; *Search's Adm'r v. Search's Adm'rs*, Id. 140.

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And he further ordered in these words: "That of my sons Gilbert, Joseph, John, Josiah, and William, which legacies I entailed to their children, if either of them should become disabled and needy, and the interest of their share not sufficient to support them, then I order my executors to pay them so much of the principal as they, in their judgment, may think they stand in need of." He appointed his son Abraham, and his son-in-law, the defendant James Grover, executors of this will.

The testator died on the first day of January, 1856. And on the 26th day of the same month, both executors proved the will before the surrogate of Middlesex, and letters testamentary were issued to them. The executor, Abraham Voorhees, died shortly afterwards. The surviving executor, the defendant James Grover, rendered his account of the estate to the surrogate of Middlesex, by whom the same was audited and reported to the Orphans Court of that county, and that account was finally settled and allowed by that court at the term of September, 1857. By this account the balance of the estate in the hands of the executor, "for distribution as per will," is stated and determined to be eighteen thousand six hundred and twenty-five dollars and eighty-four cents.

At the settlement of said account, the widow of the testator was still living. She died in September, 1861, and the house and lot devised to her, which was expressly directed to be sold after her death, had not been sold; and of course the proceeds were not included in the account.

The bill is filed by Gilbert Voorhees, one of the testator's sons, in conjunction with Gabriel A. Voorhees and Marshall Voorhees, the two sons of Gilbert, who are his only children. They claim that Gilbert was entitled to have one tenth of the balance of the estate, being eighteen hundred and sixty-two dollars and fifty cents, invested for his benefit during his life, and the interest paid to him. They state that the defendant has paid him seventeen dollars and thirty cents, and no more, on account of interest. They admit that the defendant, on the 15th day of April, 1858, paid to Gilbert Voorhees, by

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consent of his two sons, the other complainants, the sum of four hundred dollars and twenty-five cents of the principal; and insist that Gilbert Voorhees is entitled to receive from the defendant the interest on eighteen hundred and sixty-two dollars and fifty cents, from the death of the testator, to the said 15th day of April, and on the balance of fourteen hundred and twenty-two dollars and twenty-five cents from that day until now, crediting the sum of seventeen dollars and thirty cents so paid on it.

The bill prays that defendant may set forth an account of the money remaining in his hands for distribution on the settlement of his accounts, and the amount that came to his hands for the use of Gilbert Voorhees, that he may state how said money is invested, that he may be decreed to pay said Gilbert the balance of interest due to him, and such of the principal as he may need for his support, and that he may be ordered to keep the residue of the principal of Gilbert's share securely invested as directed by the will.

The answer admits and sets out the will; admits the probate and death of the co-executor, and the accounting before the Orphans Court, and the balance found due on the settlement and allowance of said account; but it claims that such account was not a final account. It sets out the inventory and the account allowed by the Orphans Court, and alleges that in said account were included three notes, given by Gilbert Voorhees to the testator, amounting, with the interest due on them, to the sum of eleven hundred and fifty dollars, or thereabouts, which notes were due and unpaid at the testator's death, and were never collected by the executor, but were included in his account, on the belief that they could be set off against Gilbert's share of the residue, or could be used in payment of the same; and insists that they can be so set off or used. It also claims that the sum of one thousand dollars invested for the widow, and the loss on the sale of the furniture bequeathed to her use, which was sold at her death, should be deducted from the balance in the account, and that the balance should be corrected, by deducting some items omitted in the account by mistake or accident. At least this

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is the view I take of the positions of the answer ; it may be erroneous. The answer is not drawn with distinctness or precision, and is so burthened with matters that are not responsive to the bill, and do not seem relevant to any defence to be set up to the suit, that it is very difficult to state with accuracy and certainty the precise ground taken by the defendant.

To the answer of the defendant a replication was filed. No proofs were taken on either side. The cause was set down for hearing, and the hearing had on his answer and replication only. By the settled rules of pleading in such case, all the allegations in the answer responsive to the complainant's bill, must be taken as true. All other allegations set up in the answer by way of defence or avoidance, being denied by the replication, and not being proved by the party setting them up, can have no effect on the decision of the cause, except where they amount to a denial of the statements of the bill.

The first and most important question in the cause, arises upon the position taken by the answer, that the defendant is entitled to deduct from the amount of the share of the residue coming to the complainant, the sum due on the notes of Gilbert Voorhees. The charges of the bill, in denying the pretences, expressly state, that the complainant, Gilbert Voorhees, was not indebted to the testator at his death. The answer states that he was indebted to the testator at his death on three notes, to an amount exceeding eleven hundred dollars. This responsive answer must be taken as true, and raises the question whether they can be set off against his share.

The directions of the will are that one tenth of the estate of the testator shall be put at interest on bond and mortgage, and the interest paid to Gilbert during his life, and at his decease the share be paid to his children. The will says expressly, "I entail the legacy." It is clear that the notes of Gilbert cannot be set off against the principal of the trust fund directed to be invested, and entailed upon, or left in remainder to, his two sons. The whole tenth must be invested. Gilbert's sons will be entitled to the whole, without any

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deduction for the debt due by their father. It does not appear, except by allegations in the answer not responsive to the bill, whether the amount due on these notes was included in the account before the Orphans Court. The defendant should, before he settled his account, have collected these notes, or if Gilbert was insolvent and they could not be collected, should not have included them in his account. If it did appear that they were included and accounted for, it does not appear, even by a naked allegation, that Gilbert is now insolvent. If he is solvent, it is the duty of the executor to collect these notes, and distribute the amount according to the will. Nor does it appear whether these notes are now collectible; the answer says they are unpaid, but for anything that appears, they may be outlawed, as the acknowledgment set up at the time of the inventory is considerably more than six years ago, and these notes, as against the interest due to Gilbert, are not merchants' accounts, that would prevent the running of the statute of limitations. The notes were due from Gilbert to the testator, on a transaction in the testator's life. The interest on his tenth is due to Gilbert, as money received by the defendant from the person to whom the tenth was loaned for Gilbert's use, a matter arising since testator's death. But if these notes are not barred, although at law they could not be offset against the interest due to Gilbert, yet a court of equity would allow them to be used in payment of the interest due to Gilbert in his life, and therefore, if the defendant thinks he can establish them as existing claims not barred, it may be referred to a master to inquire and report thereon.

The account rendered before the Orphans Court cannot be inquired into or corrected here, in this collateral way, whether it is a final account or not. It was at least the final settlement and allowance of an intermediate account, which is within the jurisdiction of that court, and on which their determination is final and conclusive, except upon appeal. Even fraud or mistake in the account cannot be inquired into collaterally, although fraud in procuring its allowance might,

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in equity, be so inquired into. And the charging himself with notes before he had collected them is not fraud, nor is it the kind of mistake that will authorize setting aside an account.

The account was rendered before the death of the widow, and the sum of one thousand dollars invested for the widow, and the inventoried value of the furniture bequeathed to her for life, were rightly included, and must be presumed to be included, in it. The defendant is entitled to an allowance from the balance as stated in the account, for any deficiency of the amount of sales of that furniture below the inventory prices. He must account to Gilbert Voorhees for the interest on one tenth of the balance as stated in the Orphans Court account, from the allowance of that account; the interest of one tenth of the one thousand dollars, and of the inventory value of the furniture left to the widow, to be deducted during her life, and of one tenth of the loss on sale of furniture from her death, and the interest of the sum of four hundred and twenty-five dollars, paid by him to the complainants, from April 15th, 1858, the time of such payment. From this amount of interest, he will be entitled to credit for all sums paid by him to Gilbert Voorhees on that account.

Gilbert Voorhees is not entitled to receive any of the principal, under the provision in the will for paying part to him if he should become disabled and needy. He neither alleges nor proves that he is so.

The defendant must account for what he may have received since the death of the widow, from the rents or sale of the house and lot devised to her for life. From this he will be entitled to allowance for any payments or expenses lawfully made or incurred since the Orphans Court account. Of the balance of the proceeds of the house and lot, the complainants will be entitled to have one tenth invested as provided by the will.

The defendant must invest the principal so settled and adjusted, on mortgage on real estate, for the benefit of the

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complainants, as directed by the will, and must report such investment to the court, designating by what mortgage their amount is secured.

There must be a reference to a master to report upon the principles above stated.

FISHER and others vs. SKILLMAN'S EXECUTORS.*

1. Under a bequest by a testator of his property, "to be equally divided, share and share alike, between my children and their legal heirs, that is to say, to J. S., D. B. S., W. S., A. S., and C. H., each a share, and the children and heirs of A. L. S., and of M. H., and of C. M. F., each a share," the legatees take *per stirpes*.

2. Where executors, directed to make a sale of the real estate of their testator, neglect their duty, and fail to obtain therefor as high a sum as might have been obtained but for their own default, they will be compelled to make up the deficiency.

3. An executor is liable for funds voluntarily placed in the hands of a co-executor and wasted.

4. An executor who delivers a mortgage to be canceled, is responsible if the debt be thereby lost.

Mr. G. A. Allen, for complainants.

Mr. B. Van Syckel, for defendants.

THE CHANCELLOR.

The complainants, who are grandchildren of Thomas Skillman, deceased, and legatees under his will, ask for an account of his estate from the defendants who are the executors of the will, and for payment of their legacies. They claim to have the residue of the estate divided equally *per capita* among them, and the defendants and other children of the testator. The will orders as follows :

"It is my will, and I direct that my executors hereinafter named, or the survivors of them, sell and dispose of all my

* CITED in *Macknet's Ex'rs v. Macknet*, 9 C. E. Gr. 294.

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landed property." "Then it is my will, and I direct, that the proceeds of these sales, together with all and singular my personal and movable property, (except as hereinbefore specially bequeathed), be equally divided, share and share alike, between my children and their legal heirs, that is to say, to Jacob Skillman, D. Bishop Skillman, William Skillman, Ann Schenck, and Caroline Holcomb, each a share, and the children and heirs of Abraham L. Skillman, and of Martha Holcomb, and of Caroline Maria Fisher, each a share."

The first section of the will directed the payment of his debts; the second made provision for his widow; and the third is in these words: "I give and bequeath to my daughter, Ann Schenck, wife of Ernestus Schenck, the sum of two thousand dollars, to be paid to her by my executors. This is my view, making her equal with my other children, as I have not given her any outset."

At testator's death there were four children of Abraham L. Skillman, and one of Martha Holcomb, who are defendants in the suit, and four of Caroline Maria Fisher, who are complainants.

The complainants and the other grandchildren claim, that by the residuary clause they each take equally with the children of the testator; that the estate must be divided *per capita* into fourteen shares, among the five children and nine grandchildren. This claim the children resist, claiming that it should be divided *per stirpes* into eight shares.

There has been much discussion in the courts, and some apparent diversity in their decisions, upon the construction of clauses like this, where property is devised to certain persons named or specified, and the heirs or children of others named or designated, to be equally divided between them.

The question is whether the children or heirs of the persons designated shall be construed collectively as together constituting one of the tenants in common, or whether each

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child or heir shall be held to be one of those entitled to an equal share.

The words in their natural meaning clearly would in all such cases, give an equal share to each of the children or heirs of the person so designated. A gift to the children of A, equally to be divided between them, leaves no doubt. A gift to A and the four children of B, equally to be divided between them, would leave little or no doubt. This shows the natural meaning of the words. Doubt arises where a father leaves his estate to his two sons and the children or heirs of other deceased sons, equally to be divided between them. The doubt, I apprehend, arises not from any difficulty about the meaning of the words, but from the fact that such a disposition of the bulk of an estate is against our ideas of natural justice; it is different from that usually prompted by paternal affection.

One of the fundamental rules of construction is, that words must be construed in their usual and natural sense. To depart from this, and construe words in another sense, would do great injustice in all cases where wills or other documents are drawn with a careful regard to the correct meaning of the words used; and in by far the greater part of wills, as well as other documents, words are correctly used in their proper meaning. This rule at once yields, at least in construing wills, in all cases where it satisfactorily appears by the context that the word is used in another sense.

The decisions of the courts upon bequests of this kind are based upon this rule, and any discordance there may be in them arises from the effect given in different cases to the other provisions of the will in controlling such bequests.

Mr. Jarman, in his treatise on *Wills*, Vol. 2, p. 111, very fairly states the result of the English and American cases on this subject. "Where a gift is to the children of several persons, whether it be to the children of A and B, or to the children of A and the children of B, they take *per capita*, not *per stirpes*." "The same rule applies where a devise or bequest is made to a person described as standing in a certain relation to the testator, and the children of another person

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standing in the same relation, as to my brother A and the children of my brother B: and of course it is immaterial that the objects of gift are the testator's own children and grandchildren; as when a legacy was bequeathed equally between my son David, and the children of my son Robert."

"But this mode of construction will yield to a very faint glimpse of a different intention in the context. Thus, the mere fact that the annual income, until the distribution of the capital, is applicable *per stirpes*, has been held to constitute a sufficient ground for presuming that a like principle was to govern the gift of the capital."

The leading case is *Blackler v. Webb*, 2 P. W. 383. The bequest there was to my son J., to my son P's children, to my daughter W's children, and to my daughter, M. P. was dead, and W. living, at the date of the will. Lord King held that by the words of the will it must go *per capita*.

In *Butler v. Stratton*, 3 Bro. C. C. 367, the direction was to divide the proceeds of sale equally between R. S., J. S., and the children of M. P. Lord Thurlow held that the four children of M. P. each took *per capita* with R. S. and J. S.

In *Barnes v. Patch*, 8 Ves. 604, the testator directed the remainder to be equally divided between his brother L's and his sister E's families. Sir William Grant held that the children of L. and E. took *per capita*, holding that family meant children.

In *Lincoln v. Pelham*, 10 Ves. 166, the gift was to be equally divided among the younger children of N. by C., and the younger children of S.; C. and S. being the daughters of testatrix. Lord Eldon held himself constrained by the decisions, to hold that the children all took equally *per capita*, though he doubted if that was the intention.

In *Williams v. Yates*, C. P. Cooper 177, the testator directed £400 to be divided equally between his son D. and the children of his son R. Lord Langdale, master of the rolls, held, it must be divided among them *per capita*.

In *Pierce v. Edmeades*, 3 Y. & C. Ex. 246, the bequest was to testator's grandchildren, E. and G., for their respective

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lives, in equal shares, and at the death of E. and G., unto all and every child and children, if more than one, of E. and G., in equal shares. E. died, leaving several children. The court held, in a well considered opinion delivered by Lord Abinger, that the children of both E. and G. were entitled to take equally, *per capita*, the whole, but not until the death of G.; holding that the words "respectively in equal shares," when not controlled by other words in the will, created a tenancy in common or *per capita*.

In *Dowding v. Smith*, 3 *Beav.* 541, the bequest was of "the residue to J. S. and to the children of M. S., to be equally divided." Lord Langdale directed a division *per capita*, a little doubting on account of the repetition of the word *to*.

In *Brett v. Horton*, 4 *Beav.* 239, the devise was of rents to A., B., C., and the widow of E., until E's children attain twenty-one; then to sell and divide the proceeds between A., B., C., and the children of E., in equal shares and proportions, as tenants in common. Lord Langdale held that the words "dividing the proceeds" would, standing alone, give it *per capita*, but that the division until sale showed a different intention, and controlled the words.

In *Flinn v. Jenkins*, 1 *Coll.* 365, the words were, "the residue to be equally divided between my two sons, for their lives only, and then to be equally divided among their children." Sir Knight Bruce, V. C., held that the children of the sons took *per capita*. He gives no reasons, and cites no authorities.

In *Rickabe v. Garwood*, 8 *Beav.* 579, the bequest was on the death of T. R., (the tenant for life,) to E. P., if living, but if dead, to, between, and among the children of said E. P., and the children of said T. R., who should be then living, equally to be divided between or among them, share and share alike, if more than one, and if but one, the whole to that child. E. P. survived T. R. Lord Langdale held that E. P. took equally with each of the five children of T. R.

In *Alvon v. Mellish*, 1 *De Gex & Smale* 355, bequest to E.

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C., S., and M., to be by them equally divided, share and share alike, and at their death to be equally divided, share and share alike, among their children. Sir L. Shadwell, V. C., held that the words "their children" must mean "their respective children," and that the children of each took only their parents' share.

In *Baker v. Baker*, 6 *Hare* 269, the directions were, to transfer the proceeds of sale "unto, between, and among my said brother and my sisters, and my nephews and nieces, living at the time of the death of my said wife, in equal shares and proportions." Shadwell, V. C., held that all took *per capita* equally, saying, "in the absence of something in the context of the circumstances of the case to exclude the natural import of the testator's words, I am bound to give them their natural effect."

In *Abrey v. Newman*, 16 *Beav.* 431, upon a bequest of property to be equally divided between B. J. and his wife, and C. A. and his wife, during their natural lives, after which to be equally divided between their children, that is to say, the children of B. J. and C. A. above mentioned, it was held by Sir. J. Romilly, master of the rolls, that the children took *per capita*.

In *Congreve v. Palmer*, 16 *Beav.* 435, the testatrix gave £3000 to her daughter for life, and at her death without children or appointment, to and equally among her sisters or their children living at her decease. Romilly, Master of the Rolls, held that the word *or* showed that the sisters' children were meant to be substituted for their parents, and therefore took *per stirpes*.

In *Walker v. Griffin's Heirs*, 11 *Wheat.* 375, the will directed the balance to be given to the families of C. and J. T. Griffin's heirs, in equal proportion. The court, in the opinion by Marshall, C. J., held that these words, *in connection with preceding bequest*, mean by families *per stirpes*, and not *per capita*; the family of C. and of J. T., each one moiety. This construction is placed on a preceding bequest, not on the words of this.

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In *Bool v. Mix*, 17 *Wend.* 119, and *Jackson v. Luquere*, 5 *Cow.* 221, the question was on the construction of Aert Mid-dagh's will. The devise was, "I give unto my two daughters, M. and N., the remainder of my land, to be equally divided between them, share and share alike, and to be to them for and during their natural life; and at their death, then to be to their and each of their children, and to be divided between them, share and share alike;" and it was held to be divided *per stirpes*. Woodworth, J., on p. 228, 5 *Cow.*, rightly puts the case upon the division for life between M. and N., and the devise over being evidently intended of the share of each equally to her children.

In this state there are two cases that bear upon this question. *Roome v. Counter*, 1 *Halst. R.* 111, and *Smith v. Curtis*, 5 *Dutcher* 345.

In *Roome v. Counter*, the testator had one son, Henry, and four daughters, Anna, Susannah, Elizabeth, and Sarah, living. His son Peter, to whom in his life testator had given a farm, was dead, leaving ten children. One daughter had died, leaving two children. The bequest was, "Item, it is my will that all the remainder of my movable estate shall be equally divided; that is to say, among Henry Counter, and the heirs of my son, Peter Counter, Anna Roome, Susannah Berry, Elizabeth Dodd, and Sarah Counter."

Chief Justice Kirkpatrick remarks that the decision of Lord King, in *Blackler v. Webb*, was an extraordinary one, and such as would hardly be made by any court at this day, and holds that Peter's heirs take *per stirpes*. And he arrives at this conclusion from the plain simple meaning of the words in the order in which they stand, and the manifest intention of the testator, to be derived as well from the circumstances of the case as from the words themselves. The words of Counter's will, from the manner in which they are placed, admit of a very different construction from the words in Skillman's will, and the words in the cases cited, and I think will warrant the construction given, without shaking the authority of

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Blackler v. Webb. Yet the court is not satisfied to rest on this, but calls in the aid of the circumstances of the case.

In *Smith v. Curtis*, the property was given "to be equally divided between my brother J., my sister H., and the brothers and sisters of my deceased wife." The court adhere to the doctrine of *Blackler v. Webb* as the rule in this state, stating that the words of the will, in *Roome v. Counter*, warranted the decision which was placed upon the words and circumstances. Chief Justice Whelpley, on p. 342, says: "While recognizing the case of *Blackler v. Webb* as correctly decided, I think that where there is any expression in the will by which it can be perceived that the testator intended a division by stocks, that intention should be carried out."

Thus the doctrine is established by a series of well considered cases, both in England and this country, that a devise or bequest like that under consideration, unless qualified by other parts of the will, gives the property to children and grandchildren equally, *per capita*. On this point the cases are uniform, and are in accordance with the principle that should govern them, the rule of interpretation mentioned above. And there can be no doubt but that the fourth clause of this will gives the residue to the children of the testator's deceased children equally with his living children, unless there is something in the other provisions of the will to control that clause.

The third clause of the will, which gives to his daughter Ann, to whom he had given no outset, two thousand dollars, contains this comment: "This is my view, making her equal with my other children." This expressly declares that it is his design and object to make his children equal.

This object will not be effected if the children of one of his deceased daughters receive four times as much out of the bulk of his estate as his daughter Ann. He has just given her two thousand dollars to make her portion equal to that of her deceased sister. This will, in accordance with the doctrine so clearly laid down by Chief Justice Whelpley, and by Jarman, and acted on in several of the cases cited, control

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the natural meaning of the words, and the children of each of the testator's deceased children will collectively take one eighth.

The next question is, whether the complainants are entitled to an account from the executors, and for what shall they be held responsible.

Accounts have been stated and re-stated in the Orphans Court of Hunterdon. Those of the executors, David B. Skillman and Jacob Skillman, have been rendered separately. William has rendered none. These accounts, if they were final accounts, rendered upon notice to all parties interested by advertising or citation as directed by law, would be conclusive in this court, and could not be opened or changed for error or mistake, although under certain circumstances they could be inquired into and corrected for fraud. But there is nothing in the case that shows them to be final accounts, or rendered upon notice or citation. The original accounts are not before me. The copies that were offered as exhibits before the master were not produced at the hearing, and are said to be lost, and the original, it is said, cannot be found in the office of the surrogate. If they were so confused, indefinite, and unsatisfactory as the re-statements of them, of which copies are before me, their loss is no injury.

From the facts that are before me I am much inclined to think that they were not accounts of the nature that renders the re-statement of them binding on this court, or that will prevent it, in the present suit, from examining into the matters contained in them. It is very difficult to tell what they do import as re-stated. It is hardly possible that they intend to hold that Jacob is liable for the amount of David's note, of which he has not received a dollar, and that David, who has never paid any part of his note, except three hundred dollars interest paid to William, is discharged from it. Yet such might be inferred from the fact that the full amount of this note, including the interest paid to William, is included in the balance stated to be in Jacob's hands, and is not in-

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cluded in the balance in the hands of David. The contrary is admitted by David's answer, and the offers in it.

I shall, therefore, disregard these re-stated accounts, except so far as they are taken as true by the pleadings and proofs in the cause.

The main question is as to the loss on the sale of the testator's homestead lot at Ringoes.

It was sold at first for five thousand two hundred dollars. The purchaser did not take the property, but four hundred dollars damages were recovered from him. It was afterwards sold by Jacob for four thousand five hundred dollars to some person who bought for Jacob. David was unwilling to convey to this purchaser, and the property was suffered to remain unsold until it was sold pending this suit, with the approbation of this court, for three thousand six hundred and forty dollars. This involved a loss of eight hundred and sixty dollars, which the complainants claim the executors must make good.

The evidence shows clearly that the property could have been sold, in the winter and spring of 1860, for four thousand five hundred dollars. The witness, Higgins, was then willing and ready to give that price. Jacob, through A. H. Landis, was willing to give that price. William would have conveyed to either. But Jacob prevented a sale to Higgins by the unlawful attempt to buy for himself.

David refused to sell to Landis for Jacob, on the insufficient pretence that it was unlawful for Jacob to buy. The only defect in such sale would have been in Jacob's title; he was willing to risk that and get it confirmed by releases. Although two years had elapsed since testator's death, and they were derelict in their duty, neither made any honest attempt to sell. David walked away from the sale and never made any effort to find a purchaser. His energies were directed to balking Jacob. And Jacob neglected and refused to perform his duty in effecting a sale of the property, by attempting to compel his co-executor to join in an illegal conveyance to himself.

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Executors have no right to accept their office and its emoluments, and then neglect their duty. They are as much liable for loss by non-feasance as by malfeasance. In this case each of these executors is grievously in fault. Either should, without hesitation, be compelled to pay the whole amount of the loss, if the other were not in fault. It is impossible to decide which is in the greater wrong, and the loss must be paid by them equally. Each must pay one-half of the sum of eight hundred and sixty dollars, with interest at six per cent., since April 1st, 1860.

The interest paid by David to William, who is insolvent, was paid by him at his own risk.

The fact that William had procured the note of David from Jacob, for the purpose of copying it, does not make Jacob chargeable with this three hundred dollars. William could not have compelled David to pay it; he was a volunteer, and there the rule applies that one executor placing funds in the hands of a co-executor who wastes them, is liable for the same.

Jacob is liable for all loss occasioned by his delivering up to William his mortgage to be canceled. The testator left this debt well secured. Jacob voluntarily delivered up the security. By this the debt was lost. The testator was surety for William on a bond; that bond would have been paid by William's portion, and was at no risk. Jacob had no right to give up the mortgage, and ask that William's share should be appropriated to pay the unsecured mortgage bond, and thus leave the complainants and other devisees to lose the surety debt, which the testator had left safe.

Jacob must be charged with six thousand two hundred and twenty-four dollars and sixty-two cents, the balance on his Orphans Court account, less the three thousand one hundred and fifty dollars, the amount of David's note charged in that account against him, and the three hundred dollars interest paid William, both of which are included in that balance, and with interest from March 21st, 1861, the date of the re-stated account.

David must be charged with four thousand and sixty-six

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dollars and eighty-two cents, the balance of his Orphans Court account, with interest from March 21st, 1861, and with the amount of principal and interest due upon his note, including the sum of three hundred dollars paid to William for interest.

If the sum paid by David to William for interest, was paid before the mortgage of William was canceled, then David shall be allowed to credit that sum as paid by him to William, on his distributive share.

Jacob shall be allowed to pay, on William's distributive share, the amount of principal and interest due on William's bond, after having deducted from said distributive share, first, the amount paid for said surety bond, with interest, and also, the three hundred dollars paid by David to William, if the same was paid by David before the mortgage of William was given up to be canceled.

Each is to be charged with all moneys received by him since the confirmation of the re-stated accounts, and to be credited with all moneys paid out by him since then ; but not with any payments made since said accounts, for costs or counsel fees.

The residue of the estate, as thus ascertained, must be divided into eight shares as above directed, and each executor shall be entitled, in settling with the residuary legatees, to be allowed the amount paid such legatees, with interest from the date of payment.

The costs of this suit must be paid by the executors out of their own estate.

Carlisle v. Cooper.

CARLISLE vs. COOPER.

WATERS vs. Same.

1. A suit in equity may be sustained to ascertain the height to which the owner of a dam is entitled to flow back water upon the lands above the dam.

2. Where, upon the hearing, the evidence as to the facts in controversy is entirely satisfactory, the court will not order an issue, or wait for the result of a trial at law, before making a decree. Nor will it on the hearing refuse relief because the complainant has delayed his suit, if it is clear upon the evidence that he ought to have the relief.

3. A bill will not be dismissed upon motion of the defendant, for want of equity, where the court cannot adjudge that under the bill the complainant will not be entitled to relief at the hearing, upon any evidence that he can offer.

4. A suitor cannot be compelled to elect between a suit in equity to prevent future injury, and a suit pending at law to recover damages for past injury.

5. A suit in equity cannot be delayed until the determination of a suit at law, where it is for a different object.

This cause came before the court upon a motion by the defendant, first, to dismiss the bill for want of equity; or, second, to compel the complainant to elect between his suits at law and that in equity; or, third, to stay proceedings in this suit, until those at law be determined.

Mr. Vanatta, in support of the motion.

As to the practice in regard to making such a motion. Here there is no objection to having the question considered and decided at this time, on a motion.

Will the court entertain such a case?

The injury complained of occurred twenty years ago. The plaintiff has been in possession as owner, since the spring of 1859, over seven years. He specifies no time when, or place where, he made request to reduce the height of the dam. He

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makes a general allegation of requests to abate, but the answer expressly denies them.

He took no legal proceedings whatever until August, 1866, when he brought an action at law. He then, before the action was at issue, filed his bill, viz. nineteenth September, 1866.

The answer denies any damage done to the plaintiff's land by the dam.

The plaintiff pretends no verdict or finding in his favor.

In *Holsman v. The Boiling Spring Bleaching Co.*, 1 *McCarter* 342, Chancellor Green said: "The Court of Chancery has concurrent jurisdiction with courts of law, by injunction, in cases of private nuisance. And it is a familiar exercise of the power of the court to *prevent*, by injunction, injury to water-courses by obstruction or diversion."

Every case which will support that doctrine will be found to be a case where the injury was threatened, not yet inflicted; or had been recently done, and was a clear violation of right, and an irreparable injury.

In *Earl v. DeHart*, 1 *Beas.* 281, the plaintiff had enjoyed the right claimed over twenty years. *The injury was recent*, and there was no dispute but that the obstruction injured the land of plaintiff.

In this connection the counsel also cited and commented on *Gardner v. Newburgh*, 2 *Johns. C. R.* 165; *Shields v. Arndt*, 3 *Green's C. R.* 238; *Bush v. Western*, *Chan. Prec.* 530; *Brakely v. Sharp*, 1 *Stockt.* 10; 2 *Stockt.* 207.

In *Hammond v. Fuller*, 1 *Paige* 197, the Chancellor ordered the case to be tried at law,

In *Ryder v. Bentham*, 1 *Ves., sen.*, 543, the injury (obstructing a light) had just been done. An order was made to keep things in *statu quo* until the right could be tried at law.

Chancellor Green (*Holsman's case*, 343,) mistakes in saying that the remedy (injunction) was applied to prevent the pollution of a water-course in *Wood v. Sutcliffe*, 8 *English L. & E. Rep.* 217, 223. The motion was denied, and principally on the ground that, from the beginning of 1845 down

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to the beginning of 1850, the defendant was allowed to construct and to use his dye works for a period of five years, without a hint being given on the part of the plaintiffs that he was doing anything which he had not a lawful right to do.

In this case the plaintiff had a verdict and judgment at law.

Indeed, all the cases referred to by Chancellor Green, and all the cases of that class, are injunction bills; bills for immediate injunction to prevent the doing of a *threatened* injury, or to arrest the further doing of an act very recently done.

They are all cases of prompt, immediate application to the court, and where the right is admitted, or else perfectly clear. None of them were for the reduction of a work put up fifteen or twenty years before, and used without question for a great length of time.

They are bills to *prevent* an injury, not to *redress* an injury done long before. This latter class of cases the court will not entertain until the right has been established at law, if at all. *Attorney-General v. The New Jersey R. Co.*, 2 *Green's C. R.* 136; *Van Bergen v. Van Bergen*, 3 *Johns. C. R.* 282.

The question of nuisance, or not, must, in cases of doubt, be tried by jury. 2 *Story's Eq. Jur.*, § 923; *Reid v. Gifford*, 6 *Johns. C. R.* 19; *Weller v. Smeaton*, 1 *Cox* 102; *Livingston v. Livingston*, 6 *Johns. C. R.* 497.

This bill has but two purposes. First, to try whether the dam, as against the plaintiff, is a nuisance. Second, as a bill of peace, to settle and secure the right, and to prevent multiplicity of suits.

The defendant, as appears by the bill, having been so long in the undisturbed enjoyment of the dam and flowage, cannot be called upon to litigate in this court the question whether the dam is a nuisance.

Nor will the court entertain a bill of peace, except where the plaintiff has satisfactorily established his right at law, or where the persons who controvert the right are so numerous as to render an issue under the direction of the court necessary, to bring in all parties concerned, and to prevent a mul-

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tiplicity of suits. *Eldridge v. Hill*, 2 Johns. C. R. 281; *Leighton v. Leighton*, 1 P. W. 671; 2 *Story's Eq. Jur.*, § 854-7-9; *Cowper v. Clerk*, 3 P. W. 155; *Davidson v. Isham*, 1 Stockt. 187.

In *Butler v. Rogers*, 1 Stockt. 489, Chancellor Williamson said: "As a general rule, the court ought not to interfere in cases of nuisance, where the injury apprehended is of a character to justify conflicting opinions, whether the injury will, in fact, ever be realized.

Mr. Pitney, contra.

I. The power of a court of equity to *abate* a nuisance already erected, is as well settled as its power to *prevent* the erection by injunction. *East India Co. v. Vincent*, 5 Atk. 83; *Van Bergen v. Van Bergen*, 3 Johns. C. R. 282; *Hammond v. Fuller*, 1 Paige 197.

Same power affirmed, and without action at law. *Gardner v. Newburgh*, 2 Johns. C. R. 162; *Belknap v. Belknap*, 2 *Ibid.* 472; *Earl v. De Hart*, 1 Beas. 287; *Reid v. Gifford*, *Hopkin's C. R.* 416.

This is really a bill for injunction to prevent Cooper *raising the water*. It is the filling the dam with water we complain of. *The dam in itself is no nuisance*. We care not for the abatement, but want injunction to *prevent use of dam*.

The case is within well settled principles of equity. 2 *Story's Eq. Jur.*, § 925-6-8; *Robeson & Maxwell v. Pittinger*, 1 *Green's C. R.* 57; *Kerlin v. West*, 3 *Green's C. R.* 449; *Coulson v. White*, 3 Atk. 21.

No judgment at law is necessary. There was no judgment at law in any of the cases above cited.

Courts of equity only require it in doubtful cases. *Hayden v. Tucker*, 37 *Missouri* 214; *Amer. Law Reg.*, November, 1866, p. 62; *Shreve v. Voorhees*, 2 *Green's C. R.* 25, 33; *Hulme v. Shreve*, 3 *Green's C. R.* 116, 121; *Shields v. Arndt*, *Ibid.* 234, 247-9; *Holsman v. Boiling Spring Bleaching Co.*, 1 *McCarter* 242-3; *Bush v. Western*, *Prec. in Chan.* 530; *Finch v. Resbridger*, 2 *Vern.* 390.

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The question at this time is : *Do the bills make a doubtful case?* If so, court may hold the bills until right is settled at law.

We contend that the allegations of the bill make a clear case. 1. That dam was raised in the fall of 1846. 2. Back-water reaches our land. 3. Dam higher than bed of stream. *Hulme v. Shreve*, 3 *Green's C. R.* 121.

The answers cannot be read on this motion. But suppose we open them.

They admit : 1. Dam raised in 1846. 2. That it was higher than bottom of stream along complainant's land. *Hulme v. Shreve*, 3 *Green's C. R.* 121. 3. A reduction of dam since filing of bill.

This is an admission of nuisance. We allege *three feet*. They admit *nine inches*.

On defendant's own showing we are entitled to an injunction to prevent another raising of the dam.

The real question in the case is : *How much did Cooper raise his dam?*

Inquiry peculiarly fitting to be made by a court of equity. It resembles the taking of an account, or fixing a disputed boundary. A jury would compromise the question.

If, when evidence is read, the Chancellor is in doubt, he may order an issue. *Townsend v. Graves*, 3 *Paige* 453-7 ; *Belknap v. Trimble*, *Ibid.* 600 ; *Smith v. Carll*, 5 *Johns. C. R.* 118 ; *Ansdell v. Ansdell*, 4 *Mylne & C.* 449, 454 ; 2 *Story's Eq. Jur.*, § 1478-9 ; *Black v. Lamb*, 1 *Beas.* 113.

II. Election between law and equity.

Complete answer is, that the suits at law and equity are not the same. One asks for damages caused by injury already done ; the other to prevent the recurrence of the injury.

Cases of indictment for assault and battery, and bail to keep the peace, are parallel. These are totally different.

Prayer for damages might have been added to these bills. In such case we must elect between the double remedy. *Hammond v. Fuller*, 1 *Paige* 197 ; 2 *Story's Eq. Jur.*, § 794-9 ;

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Royle v. Wynne, 1 *Craig & P.* 252. This latter was a case of action in both courts, to recover land itself.

In *Carrick v. Young*, 4 *Madd.* 437, the Vice Chancellor went on the ground that the court would decree payment of the rent, if the lease was established specifically.

III. To stay proceedings.

What proceedings? taking testimony? how can that injure defendant?

The court may deny relief until right established by action at law. They may take control of suits at law as ancillary to the equitable proceedings, as is said in *Royle v. Wynne*, by Lord Cottenham.

But why stop us taking the depositions of these aged witnesses? We are asking no injunction, or order, or relief. We simply wish to proceed with testimony.

THE CHANCELLOR.

The complainant in this suit alleges that the defendant, in November, 1846, by raising his dam in Black river, below where it runs through the farm of the complainant, caused the water of the river to flow back on his farm, and that, although until 1853 he so regulated the gates in the dam as to cause very little to flow back, yet since that time he has closed them, and caused great injury to the farm of the complainant; that two suits at law, brought by complainant against defendant, for the damages caused by the overflow, one in 1861, and the other in 1866, are pending; that a verdict has been rendered in one in favor of complainant, but judgment is not entered.

The prayer of the bill is, that the height of the old dam, by which it is admitted he was entitled to flow back water, may be ascertained and settled, that the dam may be reduced to its original height, and that defendant may be perpetually restrained from raising it above that height, and from further obstructing the flow of the water by any increased height or other means, with the usual prayer for other relief.

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An answer has been filed, denying in general the allegations and equity of the bill.

In this state of the pleadings, a motion is made by defendant with a triple aspect. First, to dismiss the bill, on the ground that it shows no equity on which this court can give relief. It is agreed by complainant's counsel, that the case shall be considered on this motion, as if a demurrer had been put in, and the bill dismissed, if the court is of opinion that no relief can be had on this bill upon any proof that could be offered under it. Secondly, that the complainant elect between this and his suits at law. Or thirdly, in case the bill is not dismissed, and no election ordered, that the suit may be stayed until the determination of the suits at law.

A suit in equity may be sustained to abate or remove a nuisance, and also to determine the rights between parties in cases of this sort, and to ascertain the height to which the owner of a dam is entitled to flow back-water upon the lands above the dam. And this may be done, and is done in many cases, without any trial at law. In doubtful cases, resort in general will be had to trial by jury to settle and determine the facts. But when upon the hearing the evidence is entirely satisfactory to the court, it will not order an issue, or wait for the result of a trial at law, before making a decree. Nor will it on the hearing refuse relief because the complainant has delayed his suit, if it is clear upon the evidence that he ought to have the relief granted. But delay is often the ground for refusing a preliminary injunction, as in the case of the *Attorney General & al. v. The New Jersey Railroad Company*, 2 *Green's C. R.* 136. There the bridge was erected, at least so much of it as constituted the obstruction to navigation, before the application to the court. The court held the application too late, as the preliminary injunction is only a preventive remedy, and refused the application.

No suit at law can settle the height at which the defendant is entitled to keep the water by his dam. All that such suits can settle is as to the fact whether a certain height complained of is correct or not, but how much higher the

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defendant may raise it, or how much lower he ought to reduce it, cannot be determined in the courts of law. The remedy is only in equity; it is of the same class as the remedies to establish boundaries, and to quiet title. I cannot adjudge that under this bill the complainant will not be entitled to relief at the hearing, upon any evidence that he may produce to sustain it. The motion to dismiss must therefore be refused.

The application to compel the complainant to elect between this and his suits at law must also be refused, for the reason that the suits are for different objects. The suits at law are for damages for the past; this is to prevent injury for the future. The complainant may be entitled to the relief he seeks in both courts, and a recovery in one would not interfere with his recovery in the other. His bill does not pray for damages for past injuries, and even if this court could, under the general prayer, ascertain in this suit the damages upon his application, he has made no such application yet, and when he does, it will be the proper time to interpose the existence of a suit at law, to arrest the inquiry here.

The third application, to delay this suit until the determination of the suits at law, must be refused for the reasons already given. The determination of the suit at law will not settle the height at which the defendant may maintain the water in his dam. It may settle that, at the times of the injuries there complained of, the water was too high, but how much it should be lowered, will yet remain to be settled here.

The motions must be denied.

And the same decision, for the same reasons, is rendered in the case of *Waters v. Cooper*, argued at the same time.

MacDonough v. Gaynor.

MACDONOUGH vs. GAYNOR AND GAYNOR.

1. The writ of *ne exeat* will issue only for an equitable demand; and an action for an account is an equitable demand for which it will issue.

2. It must appear by positive proof, that there is a certain sum actually due, except in account, when the proof must show *some* sum due, the amount of which may be sworn to according to belief.

3. The writ will be issued against a non-resident temporarily here, even if not in the state at the time; and it is not necessary that it should appear he is about to depart to avoid the jurisdiction, if his departure will defeat the suit.

4. If the writ is served, no subpoena is necessary; and the party cannot be discharged upon affidavit, but must make answer.

5. In cases where the court feels constrained to discharge the writ, it will often require security to abide the decree.

6. A *capias* where a *ne exeat* should have been sued out, and a bond taken thereon, simply to appear at court in the cause on the first day of the next term, are irregular and will be set aside. But the order being right, the defendants were ordered to give bond with security to answer and abide the decree of the court. Upon these terms, writ and bond set aside with costs.

This cause was heard upon a motion to discharge the defendants, who were arrested and gave bond on a writ of *ne exeat*, from the arrest and their bond, and also to discharge the order.

Mr. Dumont, in support of the motion.

Mr. Shipman, contra.

THE CHANCELLOR.

There are certain settled rules of practice in courts of equity as to the writ of *ne exeat*, which, so far as relate to the questions before the court, are these:

1. That the writ will issue only for an equitable demand, and that an action for an account is an equitable demand for which it will issue. 2 *Story's Eq. Jur.*, § 1470-1-3

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3 *Daniell's Chan. Prac.* 1802 a ; *Anon.*, 2 *Atk.* 210 ; *Porter v. Spencer*, 2 *Johns. C. R.* 169.

2. It must appear by positive proof, that there is a certain sum actually due, except in account, when the proof must show some sum due, the amount of which may be sworn to according to belief. 3 *Daniell's Chan. Prac.* 1806 ; *Rico v. Gualtier*, 3 *Atk.* 501 ; *Thorne v. Halsey*, 7 *Johns. C. R.* 189.

3. That it will be issued against a non-resident temporarily here, even if not in the state at the time, and it is not necessary that it should appear he is about to depart to avoid the jurisdiction, if his departure will defeat the suit. *Parker v. Parker*, 1 *Beas.* 105 ; *Yule v. Yule*, 2 *Stockt.* 138 ; 3 *Daniell's Chan. Prac.* 1806-8 ; *Atkinson v. Seward*, 3 *Bro. C. C.* 218 ; *Howden v. Rogers*, 1 *Ves. & B.* 129 ; *Woodward v. Schatzell*, 3 *Johns. C. R.* 412.

4. That if writ is served, no subpoena is necessary ; and party cannot be discharged upon affidavit, but must make answer. *Russell v. Asby*, 5 *Ves.* 98.

5. That in cases where the court feels constrained to discharge the writ, it will often require security to abide the decree. *Parker v. Parker*, 1 *Beas.* 105 ; *Howden v. Rogers*, 1 *Ves. & B.* 129 ; *Roddam v. Hetherington*, 5 *Ves.* 91.

In this case, the defendants had been engaged as partners with the complainant in constructing, by contract, some sections of the Morris and Essex railroad. The partnership was dissolved, and the complainant was engaged in constructing one portion of the sections, and the defendants another portion of the sections, which had, upon the dissolution, been divided by agreement. Both the defendants resided in Pennsylvania, and came over into this state while engaged in finishing their contract, and there was nothing to keep them in this state except their contract.

The affidavit states that there is nothing else to detain them in this state ; that the work is rapidly approaching completion ; and upon information and belief, that they intend to depart from this state. It is stated on oath, that they are indebted to the complainant on account of the partnership

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transactions; that a certain sum is due, and a much larger sum is believed to be due. The bill is for an account.

The writ issued was in the form of the common *capias* at law, and the bond taken was simply to appear at court in the cause on the first day of the next term.

The suit is for an account, a proper suit in equity in case of partnership. The affidavit that defendants are indebted in an amount stated according to belief, is sufficient. And the defendants, although non-residents, are liable to this writ.

The facts as to their residence, the cause of their being in the state, and that their work is near its completion, are facts to show that they will shortly leave the state, and the proof of these, with an affidavit of that intention, according to information and belief, is sufficient to sustain the order.

The writ and bond are both irregular, and must be set aside. But as the order is right, and must be sustained, the defendants will be ordered to give bond with security, in the sum of two thousand dollars, to answer and abide the decree of the court.

Upon these terms, the writ and bond must be set aside with costs.

HAY vs ESTELL and others.

1. A tenant in common has a right to partition in chancery, if he shows a title to a share.

2. When the title of the complainant in a bill for partition is disputed, it will not be settled upon the hearing in this court, but the complainant will be compelled to establish his title at law first, and the bill will be retained until he can so establish his title.

3. But it must appear clearly to the court, that there is an actual dispute, either by direct statement, or by words that amount to a direct denial of title, and not by a mere possible inference from the pleadings or proofs.

Mr. P. L. Voorhees, for complainant.

Mr. J. T. Nixon, for defendants.

Hay v. Estell.

THE CHANCELLOR.

This is a bill for partition. Two of the defendants are infants. The clerk of this court was appointed their guardian *ad litem*, and put in for them the usual answer, submitting their rights in this matter to the court, and alleging that they *have heard* "that their father was seized in fee of the lands of which partition is sought, in which these defendants have an estate in fee simple, as heirs-at-law of their said father."

Testimony was taken by both parties, and the cause was argued upon the pleadings and proofs. Upon the proofs, the complainant shows a clear title to two thirds of the lands of which partition is sought, and accordingly would be entitled to have a decree for partition. A tenant in common has a right to partition in chancery, if he shows a title to a share. *Parker v. Gerard*, *Ambl.* 236; *Baring v. Nash*, 1 *Ves. & B.* 556.

But it is the established rule of this court, where the title of the complainant is disputed, not to settle it upon the hearing here, but to compel the complainant to establish his title at law first, and the bill for partition will be retained until he can so establish his title. *Manners v. Manners*, 1 *Green's C. R.* 384; *Wilkin v. Wilkin*, 1 *Johns. C. R.* 111; *Coxe v. Smith*, 4 *Johns. C. R.* 271; *Dewitt v. Ackerman*, 2 *C. E. Green* 215; *Blynman v. Brown*, 2 *Vern.* 232.

But in such case it must appear clearly to the court, that there is an actual dispute about the complainant's title. It must not be by a mere possible inference from the pleadings or proofs. In this case, there is nothing in the answer to show such dispute. The only passage that can be construed into it, is the one quoted above. This may be literally true, and the complainant's title be undisputed. That the defendants, or their guardian, dispute this title, can hardly be inferred from the answer. It should be stated directly, or in words that amount to a direct denial of title. I do not find in the evidence, anything to show that these defendants do now, or that their father did in his life, deny the complainant's title, or anything from which it can fairly be inferred.

In the matter of Sarah Collins.

There is no ground for raising the slightest doubt upon the title, from any fact stated in the pleadings or shown in evidence. There can be no estoppel from the deed of Joseph E. West to John Estell, dated January 29th, 1831. By the deeds, the title was held in common after the death of George S. West, and no title can be had against any of the tenants in common by adverse possession of the other. There is no question of law or fact to be settled by the courts of law.

There must be a plain direct denial of the title of the complainant in the answer, or the proceedings will not be stayed for a trial at law. The complainant is therefore entitled to a decree for partition.

IN THE MATTER OF THE ALLEGED LUNACY OF SARAH COLLINS.

1. This court can and will order a second inquisition of lunacy when the first is irregular or unsatisfactory, from the finding being against evidence, or by a mistake of the jury as to their duty. Or it will order a second inquisition at some time after the first, if it appear that there is an evident change in the condition of the subject.

2. The substitution of a new commissioner for one appointed by the Chancellor, without his approval or confirmation, no one of the commissioners being a master of the court, is such an irregularity as would set aside the inquisition if urged for that purpose at or before the motion for confirmation, but would be without effect, upon the argument of a rule to show cause why a commission should not issue.

3. Imbecility for which a commission will issue, must amount to unsoundness of mind.

4. The presumption of law is not against the soundness of mind of a person one hundred years of age.

5. Where unsoundness of mind is proved, and the question is as to the degree of it, and it appears that the subject never had any property to control until the issuing of the commission, the court and inquest would and should look at the value and importance of the property to be controlled by her, and also to the persons by whom she is surrounded, and their conduct.

In the matter of Sarah Collins.

Mr. Williamson, for the petition.

Mr. W. J. Magie, contra.

THE CHANCELLOR.

A petition for a commission *de lunatico inquirendo* is presented by Noah Collins, the son of Sarah Collins, accompanied by affidavits sufficient, if standing alone, to warrant an order for the commission. But it appears that on a petition filed by the same son, an inquisition was had on the twelfth of July, 1865, and that Sarah Collins was found not to be of unsound mind; and that on the twenty-third of April last, the Chancellor quashed a subsequent order for a commission, made shortly before, on the ground that no change was shown in the condition of Sarah Collins since the inquisition. For these reasons a rule to show cause why the commission should not issue was directed, and depositions ordered to be taken. The cause was argued upon the rule to show cause, and depositions taken on both sides at great length.

This court can and will order a second inquisition, either when the first is irregular or unsatisfactory from the finding being against evidence or by a mistake of the jury as to their duty; or it will order a second inquisition, at some time after the first, if it appears that there is an evident change in the condition of the subject.

The irregularity here alleged is, that by consent of the solicitors on both sides, a new commissioner was substituted for one appointed by the Chancellor, without his approval or confirmation; and that no one of the commissioners was a master of this court. This was an irregularity that would have set aside the inquisition, if it had been urged for that purpose at or before the motion for confirmation. But this irregularity cannot affect the inquisition in this collateral way. Besides, this matter was urged before the late Chancellor on the motion to quash the second commission in April last, and passed upon by him. His order to quash was based

In the matter of Sarah Collins.

on the sufficiency of the inquisition. I do not think there is anything in the conduct of the inquisition to discredit it, or to detract from its weight on this motion.

The commission may undoubtedly issue in cases of imbecility of mind arising from old age, but it will not for every imbecility, or on the fact that the mind is somewhat impaired.

The imbecility must amount to unsoundness of mind. *Van-auken's case*, 2 Stockt. 186; *Barker's case*, 2 Johns. C. R. 232. The mind must be unsound, so as not to be able to apply its faculties in their weakened and impaired state to the objects in question.

Sarah Collins is in the hundredth year of her age. Her sight is very much impaired, and her hearing somewhat. At her age, the presumption of law is not against her soundness of mind, however great the probability in fact may be that she is not sound. But even with the presumption against her soundness from her extreme age, the evidence has failed to convince me that a new commission ought to issue. The great weight of testimony, so far as regards the opinion of much the largest number of equally intelligent witnesses, is in favor of her soundness. The weight of the medical testimony is so, either regarding the number of witnesses or the reasoning on which their conclusions are founded. The facts proved, while they show that her senses and physical powers are much impaired, and that her mental faculties are somewhat weakened, fail to show anything that would amount to unsoundness so as to make her incapable of managing her affairs. She may be so weak and infirm as to be easily influenced or imposed upon, which would be a reason for setting aside any instruments or transactions executed under the effect of such influence, but this does not amount to unsoundness, such as to take from her the control of herself and her property.

Where unsoundness is proved, and the question is as to the degree of it, the court and inquest would and should, as urged by the counsel of the petitioner, look at the value and importance of the property to be controlled, connected with

Attorney General v. Moore's Executors.

the fact that she never had any property to control until now, and that, from that circumstance, her incapacity would be greater than in case of a person used to managing property, with like unsoundness of mind ; and also look to the persons by whom she is surrounded, whether they were not attempting to obtain advantages in her imbecile state, which she might and would, under other circumstances, resist. Looking at the evidence from this point of view, I do not see sufficient proof of unsoundness or incapacity to warrant me in ordering a commission.

THE ATTORNEY GENERAL, ex rel. BAILEY, vs. MOORE'S
EXECUTORS.

N. M., by his will, gave to his executors, in trust, as follows : " With the balance of my estate which may remain after executing the foregoing trusts, to establish, as soon as may be practicable after my decease, in what is now known as the fifth ward of said city of Newark, an orphan asylum, to be called St. James Roman Catholic Orphan Asylum, and also a hospital for sick and infirm persons. And my executors, or the survivor of them, shall, as soon as may be practicable after the institutions shall have been established, cause them to be incorporated, one corporation for both institutions, and shall convey to the corporation, when created, all the property belonging by assignment or appropriation of said executors, or the survivor of them, to the institutions. In the meantime and until such incorporation, such executors, or the survivor of them, shall have the management of the institution : "

Held, that the right to establish these institutions for the purpose specified is in the executors. They are not bound to put them under the direction of the Roman Catholic Church, or its bishop, or prelates ; or to cause the worship of that church to be adopted, or its tenets to be taught exclusively, or at all, except as their own judgment impels them.

Mr. C. Parker, for relator

Mr. Bradley, for defendants.

THE CHANCELLOR.

The hearing in this case is upon bill and answer. Nicholas Moore, of the city of Newark, by his will, dated March 29th, 1865, gave to the defendants, the executors thereof, the bulk of his estate for certain specific objects; one of which, being the sixth and last, is designated in these words:

"Sixth. With the balance of my estate which may remain after executing the foregoing trusts, to establish, as soon as may be practicable after my decease, in what is now known as the fifth ward of said city of Newark, an orphan asylum, to be called St. James Roman Catholic Orphan Asylum, and also a hospital for sick and infirm persons. And my executors, or the survivor of them, shall, as soon as may be practicable after the institutions shall have been established, cause them to be incorporated, one corporation for both institutions, and shall convey to the corporation when created, all the property belonging by assignment or appropriation of said executors, or the survivor of them, to the institutions. In the meantime, and until such incorporation, such executors, or the survivor of them, shall have the management of the institution."

The testator belonged to St. James Roman Catholic Church, in Newark, of which the defendant, John M. Jervais, was pastor. And in the clause appointing the executors Jervais is so described. Theodore Runyon, the other executor, is there described as mayor of the city of Newark, which office he then filled.

The executors design to perform the trust imposed by the above recited clause of the will, by establishing an orphan asylum and hospital, not under the control of the Roman Catholic Church, or of the bishop of the diocese of that church, in which they will be located.

The information is on the relation of the Right Reverend James Roosevelt Bailey, the bishop of that diocese. He claims that it was the intention of the testator to place the orphan asylum and hospital under the exclusive control and manage-

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ment of the Roman Catholic Church ; that the trustees should be members of that church, and that they should be subject to the right of visitation, for spiritual purposes, of the bishop and clergy of that church ; and that its doctrines and tenets should be taught, and its forms of worship observed in these institutions.

The prayer of the bill is, that the defendant may be compelled to establish these institutions upon such principles, and may be required to adopt and procure a charter designed by the relator for the purpose of carrying them out, a copy of which is annexed to the bill.

The main question in the case is, was it the intention of the testator, in founding these institutions, to make them denominational, and to place them under the control of the Roman Catholic Church, of which he was a member ?

There is nothing in the clause of the will above recited that bears upon this question, except the name of the orphan asylum. He directs that it shall be called "St. James Roman Catholic Orphan Asylum."

It does not seem to me that the mere name is sufficient to give character or control of the institution. The direction is to establish "an orphan asylum," to be called by that name. If he had entertained the intention contended for, the most natural way to have expressed it was to direct the establishment of a "Roman Catholic Orphan Asylum," to be called by that name. It seems to me that this would naturally, if not unavoidably, have suggested itself to him, or the draftsman of the will, in casting about for words to express that intention.

No one would suppose that naming a charity after an individual, or society, or a church, would give the individual, or body whose name was used, the control of the charity. Directing a charity to be named the McClellan Hospital, the Lincoln Home, or the Farragut Snug Harbor, would not give to the person whose name was thus used the visitation or control of it. The testator directed this asylum to be named after his own church, St. James Roman Catholic

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Church, most probably to show his respect for, and his attachment to, that church and its pastor. And if the right to control is to be inferred from the name, it should be given to St. James church and its pastor.

Nor do the other provisions of the will, or the circumstances of the testator, change the construction of this clause so as to give it a different signification from the plain meaning of the words.

He first directs his debts to be paid, and seven hundred dollars to be appropriated for his funeral expenses, and the benefit of his soul and the soul of his deceased wife. The residue of his estate is given to his executors in trust as follows: first, secondly, and thirdly, to pay three small legacies, amounting to five hundred dollars; fourth, to expend one thousand dollars for an altar, and six hundred dollars for two windows in St. James Roman Catholic Church; fifth, to pay to St. Mary's Orphan Asylum, in Newark, four hundred dollars; and then follows the sixth, the clause above set forth.

The fact that after making these bequests, some for purely religious and denominational purposes, and so expressly restricted, he directed these institutions to be established by his executors, shows that he did not mean so to restrict them.

This conclusion is strengthened by the fact that one of the executors named to fulfill this trust was a protestant, and was described by the office which he held, mayor or chief magistrate of the city where the institution was to be located. That the testator was a decided catholic, and made large bequests to the church of which he was a member, must, under these circumstances, weigh against the construction of the re-lator. He would not, if his object was to place these institutions under Roman Catholic control, have directed their establishment by a known protestant, who, as survivor, might have had the entire direction of their future character.

In my view, the right to establish these institutions for the purpose specified in the will, is in the executors. They and they alone can control the matter. They are not bound

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to place them under the direction of the Roman Catholic Church, or its bishop, or prelates; or to cause the worship of that church to be adopted, or its tenets to be taught exclusively, or at all, except so far as their own judgment impels them.

As no relief can be given here, the bill must be dismissed.*

FETTERS vs. HUMPHREYS AND WIFE.†

1. Where the owner of lands devised the same in two parcels, one to A, and the other to B, the fact that he was accustomed in his lifetime to use an alley upon the land devised to B, as a means of egress from his stable upon the land devised to A, to the street, will not create an easement in B's land in favor of A, he being able to construct a way over the parcel devised to him, from the stable to the street, and such easement, therefore, not being *necessary* to the beneficial enjoyment of his land.

2. Discontinuous easements not constantly apparent, are continued or created by a severance, only when they are necessary, and that necessity cannot be obviated by a substitute constructed on or over the dominant premises.

3. The leading cases examined and commented upon.

Mr. Carpenter, for complainant.

Mr. J. B. Dayton, for defendants.

THE CHANCELLOR.

Richard Fetters, the husband of the complainant, and the father of the defendant, Eliza Humphreys, died in August, 1863, seized of considerable real property in the city of Camden. He occupied, as his dwelling, a house on the south side of Market street, built on a lot forty feet wide and one hundred and eighty feet deep. The west side of this lot was one hundred and twenty feet east of, and parallel to the

* Decree affirmed, 4 C. E. Gr. 503.

† CITED in *Denton v. Leddell*, 8 C. E. Gr. 67.

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east side of Third street. The dwelling-house was built on the east half of the lot, twenty feet wide, and the other half was occupied by an ornamental flower garden, which the deceased, who was a florist by occupation, had for years kept up with great care and expense. The front along the street was enclosed by an open iron fence.

On the rear of this lot there was a frame stable, worth about three hundred dollars, which had been placed there by the deceased, and which he used for his horse and carriage, and his florist's wagon. The only egress from this stable was through a lane or alley running from the southwest corner of the lot westwardly across other lands owned by him to Third street. This alley was ten feet wide, and run between and adjoined two brick houses owned by him, standing on Third street, with side-doors opening on the alley. On both sides of this alley he formerly had kept green-houses, to which it gave access. These, after he had discontinued active business, had been removed.

In this situation of the premises, Richard Fetters, by his will dated March 31st, 1863, devised the house and lot to his wife, the complainant, for her life; and the residue of his property to his children. By a division made according to the provisions of his will, the part of his property between the rear of the homestead lot and Third street, which included the alley and the two brick houses on each side of it fronting on Third street, was allotted to, and became the property of, the defendant, Eliza Humphreys. The defendants being advised that this property was held by her under the devise in the will free from any easement of passing over it from the homestead lot, shut up the rear of the alley and prevented the complainant, and her tenant of the stable, from passing through it to Third street. There is no access from the complainant's stable to any public street, except through this alley, or by cutting a way through the ornamental garden along side of the house and the iron fence that separates it from the street.

The complainant now seeks, by injunction, to restrain the

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defendants from obstructing her and her tenant and tenants, from passing over and along said alley and passage-way to and from said stable and the street.

It is clear that a man can have no easement in his own property, and that in the life of the testator there was no easement belonging to the homestead lot to pass out to Third street over this alley. An easement, by its definition, is a right in the lands of another. His right to pass out this way was perfect, as owner of the land over which he passed; it was not a right appurtenant to the homestead lot. He bought the lots from different owners, and no such right existed at his purchase. If it had, the unity of title would have extinguished it.

A privilege or right attached to one tenement or parcel of land, to enjoy some benefit in or over another tenement or parcel, is called an easement of the dominant tenement, to which it belongs, and a servitude upon the servient tenement, or that in which it exists. These easements are either apparent and continuous, or not so. Apparent or continuous easements are those depending upon some artificial structure upon, or natural formation of, the servient tenement, obvious and permanent, which constitutes the easement or is the means of enjoying it; as the bed of a running stream, an overhanging roof, a pipe for conveying water, a drain, or a sewer. Non-apparent or non-continuous easements are such that have no means specially constructed or appropriated to their enjoyment, and that are enjoyed at intervals, leaving between these intervals no visible sign of their existence; such as a right of way, or right of drawing a seine upon the shore.

In some cases easements are created by implication, where lands held by the same owner are sold or devised in different parcels, or where lands held in common are partitioned. If, until the time of severance of title, there has been a way or drain, or other matter in the nature of an easement, from one of the parcels through the other, established and kept up by the common owner of both, and necessary for the beneficial

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enjoyment of the dominant parcel, then an easement is created by such sale, devise, or partition.

This principle was approved and adopted by this court in the judgments of Chancellor Williamson, in the case of *Brakely v. Sharp*, reported in 1 *Stockt.* 9, and 2 *Stockt.* 206; and his opinion is sustained by the authorities cited by him, and other cases in England and this country, decided both before and since. The result arrived at on the final hearing of the cause was different from that on the motion to dissolve the injunction, but this arose from the different application of another rule. The opinion of the Chancellor on the point now in question, was the same on both arguments.

The exception to the rule, which the Chancellor attempted to apply on the argument of the injunction, is this: that if the common owner convey the servient tenement, retaining the dominant, he is held to convey all his right in it, including the right to enjoy the privileges before enjoyed upon it for the benefit of the dominant tenement, and it is conveyed free of any servitude. But the exception is too broadly stated, and is not sustained by the authority cited for it; and by most of the authorities, it is confined only to non-apparent easements, such as rights of way. And it is held that apparent or continuous easements, such as the use of water-pipes and sewers in existence, will be created by implication upon the conveyance of the servient tenement by the common owner, he retaining the dominant tenement. This is the doctrine in *Nicholas v. Chamberlain*, *Cro. Jac.* 150, cited as the leading case on the whole subject, and in *Pyer v. Carter*, 1 *Hurlst. & Nor.* 916. Judge Selden, in delivering the opinion of the Court of Appeals in New York, in *Lampman v. Milks*, 21 *N. Y. Rep.* 506, expressly holds it. He says: by a sale, "easements or servitudes are created corresponding to the benefits and burthens mutually existing at the time of the sale. This is not a rule for the benefit of *purchasers only*, but is entirely reciprocal. Hence if, instead of a benefit conferred, a burthen has been imposed upon the portion sold, the purchaser, provided the marks of this bur-

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then are open and visible, takes the property with the servitude upon it." And on page 516, he says: "Those easements which are discontinuous pass upon severance of tenements by the owner, only when they are absolutely necessary to the enjoyment of the property conveyed." *Gale & Whatley*, in their treatise on *Easements*, p. 40, lay down the rule with the same qualification.

The reasoning of the Supreme Court of Massachusetts, in *Johnson v. Jordan*, 2 Metc. 240, takes the other view of the case. But it is not supported by the authorities cited, and had no bearing upon the decision of the case, which turned upon the fact that the easement claimed was not necessary to the enjoyment of the tenement conveyed, which was the dominant and not the servient tenement.

In the case of *Stuyvesant v. Woodruff*, 1 Zab. 133, the parcels were conveyed out of the original owners of both, by commissioners for partition, and therefore, are to be considered as conveyed at the same time. The easement claimed was a right of way at the southwest corner of Stuyvesant's land, over the northwest corner of Woodruff's lot, because the former owner of the whole, before the severance of the title, had been accustomed to drive out upon the public road in that direction. This was not an apparent or continuous easement, nor was it necessary to the enjoyment of the lot of Stuyvesant, because he could drive out upon the public road over the part of his own premises next adjoining to that part of Woodruff's lot over which the easement was claimed. And it was held that no easement was retained upon severance of title. The ruling in that case is perfectly consistent with that in *Brakely v. Sharp*, and the decisions upon which it is founded.

In the cases of *Pyer v. Carter* and *Lampman v. Milks*, *supra*, it was held that the easement was created by grant, although not *necessary* to the enjoyment of the property, and although another could be created on the land granted, at a small expense; and that the grantee was entitled to the pro-

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erty as it was enjoyed at the time of the grant. The contrary doctrine is held by the Massachusetts cases. *Nichols v. Luce*, 24 Pick. 102; *Johnson v. Jordan*, 2 Mete. 234; *Thayer v. Payne*, 2 Cush. 327. These all hold that no easement is created by implication, except in case of necessity.

And in New Jersey, the decision of the Supreme Court in *Stuyvesant v. Woodruff*, and the opinion of the Chancellor in *Brakely v. Sharp*, hold that no easement will arise by such implication, unless necessary to the beneficial enjoyment of the property. And this rule is founded on reason and good sense, as well as upon these authorities, which I am not at liberty to disregard while sitting here.

The complainant then, is not entitled to the use of this way unless necessary to the beneficial enjoyment of the property devised to her for life. It is not absolutely necessary, for she can open a way to Market street over the land devised to her, and thus have access to the barn. It will materially injure the property to open this way, and probably the opening would be attended with some expense. In the case of drains and water-pipes, and apparent and continuous easements of that nature, the fact that others may be substituted for them on the premises conveyed, at a reasonable cost, has been held in some cases not to affect the right. *Pyer v. Carter*, 1 Hurlst. & Nor. 919. Although the contrary doctrine is laid down in *Johnson v. Jordan*, 2 Mete. 234. overruled now

But discontinuous easements, not constantly apparent, are only continued or created by a severance, when they are necessary, and that necessity cannot be obviated by a substitute constructed on or over the dominant premises. *Lampman v. Milks*, 21 N. Y. Rep. 506; *Thayer v. Payne*, 2 Cush. 332; *Pheysey v. Vicary*, 16 M. & W. 484.

The case of the *United States v. Appleton*, 1 Sum. 492, is the only authority that I find against this rule. But Justice Story, in his opinion, was evidently guided by the cases on continuous and apparent easements, to which alone he refers, and upon which he relies. His attention was not called to

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the well established distinction between the two kinds of easements.

X This difference in the rule, as applied to the two classes of easements, is founded upon reason and the nature of the easement itself. A continuous or apparent easement is either a fixture, or it is enjoyed by means of a fixture, upon the land itself. There is something visible by which it may be known to a purchaser, as an overhanging roof, open windows, a sewer, or a water-pipe, actually engaged in fulfilling their duties. A right of way, or discontinuous easement of any kind, is only exercised at intervals, and is a latent encumbrance or claim, the very existence of which may depend on uncertain and doubtful testimony. In other respects, to establish the creation of a right of way by implication on a conveyance of property, because a former occupier was in the habit of passing out in a certain direction, would be productive of great inconvenience, and would work injustice, especially in city property. If A should purchase of B a city lot, adjoining the house lot of B, and it should turn out that the servants of B had been in the habit, by B's direction, of crossing over B's lot diagonally to the street, from a gate in the side of the house lot retained, A could not build on the front of the lot. Such use, until and at the time of sale, would create an easement over the lot sold, by implication. The same result would follow in case of partition, or a sale in partition. The rule as established in the case of permanent apparent easements is, I think, of very doubtful expediency. But this is the law as I find it. I do not feel inclined to extend it.

The doubts, difficulties, confusion, and indecision in the minds of the Barons of Exchequer, as exhibited in their attempt to apply the rule to a right of way, almost a way of necessity, in *Pheysey v. Vicary*, 16 M. & W. 484, shows the inexpediency and impracticability of the rule in case of other than apparent and continuous easements, except when required by absolute necessity. X

The property of the complainant could be better and more

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beneficially enjoyed by the use of this alley as it was used by the testator in his lifetime, but it is not necessary to the beneficial enjoyment of it. The right of way, therefore, cannot arise by implication from the devise to her.

The bill must be dismissed.*

KEELER'S EXECUTOR vs. KEELER and others.

1. Under a bequest as follows, to wit: "I give and bequeath to my son, D. K., and his heirs, the sum of \$300, if he or they shall appear or claim the same within three years from the time of my decease," held that a demand by D. K., by his attorney duly authorized by a special power executed for that purpose, was sufficient to entitle him to the legacy; it was not necessary for him to appear in person.

2. Costs to be paid out of the residue, on settling the estate, if the executor hesitated to pay the legacy from honest doubts of his liability, or at the request of the residuary legatees.

Mr. E. Merritt, for executor.

Mr. F. Voorhees, for defendants.

THE CHANCELLOR.

This cause was submitted on brief. The bill was filed by the complainant, as executor, to settle the construction of a bequest in the will of his testator. The defendant, Daniel Keeler, claimed a bequest of three hundred dollars; the other defendants, who are the legatees of the residue, dispute his right. The bequest in the will is, "I give and bequeath to my son, Daniel Keeler and his heirs, the sum of three hundred dollars, if he or they shall appear or claim the same within three years from the time of my decease."

The son, Daniel Keeler, within three years after the testator's death, by his attorney duly authorized by a special

* Decree affirmed, 4 C. E. Gr. 471.

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power executed for that purpose after the testator's death, demanded this legacy of Daniel Larue, since deceased, who was a co-executor of the will, and who promised to pay it. He did not appear in person before either executor. The question submitted is, does this bequest require that he should have appeared in person?

I think it does not. The will does not require it, but only that he should appear. The courts cannot add words that are omitted by the testator, unless the object in view implies them, and they are necessary to the construction. In this case, nothing requires such appearance before the executors. The usual and accepted meaning of the word does not require it. If any one whose residence had been unknown, or who had not been heard of for several years, should come to light by returning to the country, or letting his residence be known, this would be a clear compliance with the condition to appear in the usual acceptation of the word.

Daniel Keeler is entitled to the legacy. This is not strictly a bill of interpleader, and if it were, it is not a case in which the costs should come out of the fund or the legacy in question. If the complainant hesitated to pay the legacy from honest doubts of his liability, or did so at the request of the residuary legatees, the costs will be allowed in settling the estate, out of the residue.

DURLING and others *vs.* MCPEEK and wife.

Samuel Sharp, by his will, dated January 1st, 1860, devised lands to his daughter, Margaret McPeek, and charged them with a legacy of \$200 to his daughter, Eliza Durling, and her two children. By a codicil, dated the 31st of March following, he directed that, "in case Maria Durling and her children should choose to remain with me until the time of my decease, that then or in that case, she or they pay the sum of \$100 for each and every year she or they do remain, from the second day of April next ensuing the date hereof, said \$100 for every year to be deducted from their legacies bequeathed to them; the time of their remaining, if at all, not to exceed three years from the date hereof." To a bill for the payment of the

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legacy, setting out that Eliza Durling and her children had, for years prior to the date of the will, been living in the testator's house, and had various privileges upon the farm, and continued living in the same manner until testator's death, without notice of the provisions of the will or codicil, and without opportunity of making her election, the defendants demur.

Held, that the words in the codicil, "choose to remain," mean choosing to remain rather than go away, not choosing between remaining and the legacy. Demurrer sustained.

Mr. Vanatta, for complainants.

Mr. S. S. Halsey, for defendants.

THE CHANCELLOR.

Samuel Sharp, the father of the complainant Eliza Durling, and of the defendant Margaret McPeek, by his will, dated January 1st, 1860, devised lands to Margaret McPeek, and charged them with a legacy of two hundred dollars to the three complainants, Eliza Durling and her two daughters. By a codicil made on the 31st of March thereafter, he directed that "in case Maria Durling and her children should choose to remain with me until the time of my decease, that then and in that case she or they pay the sum of one hundred dollars for each and every year she or they do remain, from the second day of April next ensuing the date hereof, said one hundred dollars for every year to be deducted from their legacies bequeathed to them; the time of their remaining, if at all, not to exceed three years from the date here." Testator died April 19th, 1863.

The complainant, Eliza Durling, who for over twenty years had been divorced from her husband, was at the date of the will, and had been for years prior thereto, living in one part of the testator's house, with her children, and had their fire-wood, the keeping of a cow, and some other privileges upon the farm of the testator. They continued living there in the same manner until testator's death, but without any notice of the provisions of his will or codicil, and without any opportunity of making any election between remaining

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there and having one hundred dollars per year deducted from their legacy.

To a bill for the payment of the legacy setting out these facts, the defendants demur. And the sole question is whether remaining in the house, without electing between that and the legacy, or an opportunity to make such election, is within the meaning and intention of the provisions of the codicil.

The words in the codicil, "choose to remain," can only mean choosing to remain rather than go away; not choosing between remaining and the legacy. This is the natural meaning of the words, and in their allocation, no other can be given to them. From the structure of the will and codicil, taken together, I have no doubt that this was the real meaning of the testator. He did not mean to put to them the choice between staying and receiving their legacy. But if they did choose to stay with him, of their own accord, he meant to consider it a payment of their legacy on his own terms. He had no occasion to make a bargain with them; he was master of the situation and could prescribe his own terms.

The demurrer must be sustained.

METLER'S ADMINISTRATORS vs. METLER and wife.*

1. The general rule is, that where a note is without consideration, relief cannot be had in equity on that ground merely. But where the note is negotiable, and not void on its face, and in case of a discontinuance or non-suit might be held until the evidence of its being without consideration could not be had, and then a suit on it be brought against the administrators or the infant heir, to the amount of assets descended, a court of equity will order the security to be given up to be canceled.

2. When a demurrer is too extensive, or bad in part, it must be wholly overruled.

3. The peculiar relations of husband and wife will not protect her from making a discovery relating solely to her own conduct, and affecting only her own interests. In such case she may, under the recent acts, even be compelled to testify against herself.

* CITED in *Shotwell's Adm'x v. Struble*, 6 C. E. Gr. 35; *Vail's Ex'rs v. Central R. Co.*, 8 C. E. Gr. 466.

Metler's Administrators v. Metler.

This suit is for discovery and relief. It is brought by John Kinney and Charity A. Metler, administrators of Charles W. Metler, deceased, against Orison Metler and Delilah Metler. Charity A. Metler is the widow of the intestate, and the defendants are his father and mother.

The bill sets forth that the complainant was married to the intestate in 1862; that they resided at Phillipsburgh, in Warren county, and had one child, who is still living; that the intestate owned a house and lot in which they lived, worth about fifteen hundred dollars; that in the year 1865 the intestate, through the interference of the defendant, his mother, became estranged from his wife, neglected and ill treated her, and refused to provide for her and their child; that in March, 1865, he sold his house and lot, and persuaded her to join in a deed to convey it, after which he told her that he now had all he wanted from her, and intended to leave her and make no further provision for her or the child; that the deed not having been delivered, she afterwards procured possession of it, and kept it from him and the grantee; that he tried to get her to sign and acknowledge another deed, by persuasion, threats, and severe floggings; that he left her and carried away her infant child for the same purpose, but that she held out, and did not give up the first deed, or execute a new one.

That after this the intestate, who was by occupation an engineer, or engine-driver on railroads, and was and had for years been much absent from home in the western and southwestern states, gave to the defendant, Delilah Metler, his promissory note for fifteen hundred dollars; that this note was given without any consideration; that the defendant, Delilah, had for years been living separate from her husband, Orison, who was a wandering, homeless shoemaker, without property, and that she had no means or property except a small house in which she lived, not wholly paid for, and could not give, and did not give, any consideration for the note; that the note was given to her when the intestate was about going out to the oil regions, and was given with the understanding that if he returned alive it should be given up to him; that it was given for the amount for which he had

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agreed to sell his homestead, being about the value of it, and was given with the fraudulent intention and purpose by both parties, to enable his mother to cover his property and defeat any recovery his wife might obtain against him for alimony or maintenance, and with the view that, in case of his death, his mother might have the property, and that his wife and child should have none. The intestate did return alive from the oil regions, but did not require his mother to give up the note, and on the first of December, 1865, met an unexpected death, being killed in an accident on a railroad in this state.

The bill further alleges that the defendants have lately commenced an action in the Supreme Court against the complainants upon said note, and have declared on it as a note given on the third day of May, 1865, for fifteen hundred dollars, payable to the order of the defendant, Delilah Metler; and that that suit was commenced without the knowledge or consent of the defendant, Orison Metler.

The bill insists that complainants are entitled to a discovery to aid them in their defence at law, and also to relief in this court. It prays for a discovery, and for relief by perpetually enjoining the suit at law, and ordering the note to be given up to be canceled.

The defendants demur to the bill generally, and allege as a special ground of demurrer to the discovery, that the defendants, being husband and wife, are not either of them bound to make any answer or discovery that may affect the claims or rights of the other.

Mr. Shipman, in support of the demurrer.

Mr. Dumont, contra.

THE CHANCELLOR.

The first question is, whether the complainants are entitled to the relief sought for. That relief is to have a perpetual injunction against the proceedings at law, and to have the note delivered up to be canceled.

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The note, being without consideration, is void, and cannot be recovered upon at law. And it is contended that, as the complainants have a complete defence at law, they cannot resort to equity. Such, no doubt, is the general rule, and were the present suit at law the only matter to be relieved against, it might decide this case. But here is a note, not void on its face, which in case of a discontinuance or non-suit, might be held until the evidence of its being without consideration could not be had, and then a suit on it brought against these parties, or against the infant heir, to the amount of assets descended. In such case the jurisdiction of courts of equity to order the security to be given up to be canceled, is now well established. There has been some diversity of opinion and decision on this point, and more in cases when the instrument asked to be canceled is at law void upon its face; but even then the weight of authority is in favor of it. In cases where the instrument is on its face valid, and especially if negotiable, the jurisdiction of the court is founded upon principle adopted among other cases in bills *quia timet*, and is now settled by authority. 1 *Story's Eq. Jur.*, § 699, 702; *Minshaw v. Jordan*, 3 *Bro. Ch. Cas.* 17; *Newman v. Milner*, 2 *Ves.* 483; *Bromley v. Holland*, 7 *Ves.* 3; *Jervis v. White*, *Ibid.* 413; *Jackman v. Mitchell*, 13 *Ves.* 581; *Wynne v. Callander*, 1 *Russ.* 293; *Peirsoll v. Elliot*, 6 *Peters* 95; *Hamilton v. Cummings*, 1 *John. C. R.* 520.

As the complainants are entitled, upon the case made in their bill, to have this note delivered up to be canceled, the demurrer cannot be sustained to the relief. It is bad in part. But it is a well established rule in equity when a demurrer is too extensive, or bad in part, that it must be wholly overruled. *Story's Eq. Pl.*, § 443, 448, 692; 1 *Daniell's Chan. Prac.*, (3d *Amer. ed.*) 568 and 608.

This is a demurrer to the whole bill, and includes both the relief and discovery. The causes of demurrer assigned, which together must be co-extensive with the demurrer, are in part to the relief and in part to the discovery. And then by that rule, although the demurrer might be good to the

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discovery, yet, being bad in part, it must be wholly overruled. The only exception to this rule, if there is any, is where a bill for discovery also prays relief, and a general demurrer is held good to the relief but not to the discovery. In such case the former English decisions, and the decisions in America, hold that the demurrer will not be a bar to the discovery. The modern English cases hold that it will, on the ground that the discovery being only the means for the relief, if that relief cannot be granted the discovery is of no avail. 1 *Story's Eq. Jur.*, § 70; 1 *Daniell's Chan. Prac.* 569.

The court, in *Miller v. Ford*, *Saxt.* 365, adopted the modern English rule, that when a plaintiff on a bill praying relief, is not entitled to relief, he is not entitled to discovery. But this doubtful exception does not affect the converse proposition, that where, on demurrer to the whole bill, the complainant is held entitled to the relief, the demurrer cannot be sustained as to the discovery, even if a demurrer to the discovery alone would be good.

The expression in *Miller v. Ford*, "that when a party is not entitled to relief he is not entitled to a discovery," is strictly correct, when applied, as it was in that case, to a bill for relief; but not correct when applied to a bill for discovery only, when not praying relief.

The general rule is that in all cases where the complainant is entitled to relief, he is entitled to discovery. But to this there are exceptions; as in cases where the discovery would subject the defendant to indictment, forfeiture, or penalty, when it would be a breach of professional confidence, or would be of matters irrelevant and immaterial to the relief sought; in all which and similar cases, a demurrer may be taken to the discovery only. 1 *Daniell's Chan. Prac.* 571, 588 to 607.

It is clear, therefore, that whether a demurrer to the discovery in this case, on the ground assigned, would be good or not, that the demurrer must be overruled. It cannot be sustained in part.

This state of the pleadings would render it unnecessary to

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consider the question raised and argued, whether the defendants can be compelled to answer and make discovery, when the answer of either may affect the other on account of their relation as husband and wife.

But as this court may in its discretion, before actual decree, give leave to amend the demurrer, or to put in a less extended demurrer, (1 *Daniell's Chan. Prac.* 609), and the matter has been argued, it is necessary to consider and determine it.

And here the question is, whether either of the defendants can be required to answer, or could be protected by demurrer from the discovery.

And first, can the defendant, Delilah Metler, be protected from discovery? The subject matter of the suit is a note given to her by her son in May, 1856. She was then married, and by the married women's act of 1851 she was entitled to receive and hold it to her separate use, as if she were a single female, free from the control of her husband; he has no interest in it, or the controversies concerning it. The suit at law was brought by her. His name was used by her without his knowledge, because the law requires him to be joined in a suit brought by her for her own rights. She has perhaps the right so to use it, without his authority.

The suit is of necessity brought against both, but it is to enjoin *her* suit, and to compel *her* to give up and cancel the note, which she is charged with obtaining without consideration, and for the purposes of fraud. I do not find anything in the statutes or decisions of the courts, or in the policy of the law arising out of the peculiar relations of husband and wife, to protect her from making a discovery relating solely to her own conduct, and affecting only her own interests. I do not see any reason why, in such case, she may not, under the recent acts, even be compelled to testify against herself.

A married woman is not compelled to make discovery or to testify in suits against or by her husband, when he is the party interested or to be charged; and this whether she is a

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party with him or not. But there is no case in which it is held that she need not make discovery or testify where the suit concerns herself, or her property only. I agree with the court in *Handlong v. Barnes*,* and with the cases there cited, that it is the policy of the law arising out of the relation of husband and wife, and not the mere matter of interest, on which the exclusion is founded. But this must not imply assent to the position taken in one of the opinions, that if the suit was for property solely her own, and her husband joined for form only, as the judgment would be against him as well as herself, she could not testify. Even if the judgment could be against him for costs, the maxim *de minimis* would there apply. But if he had a joint interest with her in the lands, as was the fact for aught that appears in the case, then as she could not be sworn, Barnes could not, as the act prohibits it. And the decision was that required by the act.

But when the wife alone is the real plaintiff or defendant, she is made competent by the act of 1859 which must be read, notwithstanding its peculiar wording, as if it expressly made all parties competent to testify. If it only removed the disqualification of interest, as before it nominal parties without interest could not testify, no party could yet be sworn. The contrary is the well settled construction, and all parties not within the exceptions are competent. There is nothing in the words of the act, and no reason in the policy of the law, why a woman having a suit should not be permitted or compelled to testify when her husband has no interest.

Her evidence in such case, as in this, would affect her own rights only; and here the old sound maxim should be applied, *cessante ratione cessat ipsa lex*. This maxim must govern in the application of a rule founded solely on a reason of policy. And this is a case in which the observation repeated with approval by the Chancellor, in *Wheaton v. Phillips*, 1 *Beas*. 221, should have great weight, "that remedies must adapt themselves to the times, and to new customs and manners as they arise."

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The English cases cited in *Handlong v. Barnes*, are those in which the husband alone was the party. The act of 14 and 15 *Vict.*, *ch.* 99, August, 1851, called Lord Brougham's act, only enacted that parties to the suit could be sworn. The act of 16 and 17 *Vict.*, *ch.* 83, called Lord Campbell's act, and founded on his observation in *Stapleton v. Crofts*, allowed and compelled the husbands and wives of parties to be sworn. The act of this state is in effect the same as Lord Brougham's, and under that the Court of Common Bench unanimously allowed the wife to be sworn in a suit brought by her in the names of her husband and herself, for an injury to her. This case of *Stokehull v. Pettingell*, is reported in a note to *Stapleton v. Crofts*, 10 *Eng. L. & Eq. R.* 458, but on account of Lord Campbell's act of 1853, is not found in the regular reports.

In New York, the amendments to the Code, § 399, passed successively in 1857, 1860, and 1862, each provided that "a party to an action may be examined as a witness in his own behalf, or in behalf of any other person."

It was held that this did not make the husband or wife of a party, a competent witness. But when the husband or wife was the meritorious party, although the other was joined, such party was competent. *Marsh v. Potter*, 30 *Barb.* 506; *Babbott v. Thomas*, 31 *Barb.* 277; *Schaffner v. Reuter*, 37 *Barb.* 44; *Hooper v. Hooper*, 43 *Barb.* 292.

The Massachusetts act of 1856, *ch.* 188, authorizes parties to all actions to testify for themselves. And their courts hold that the wife is a competent witness in a suit brought for a personal injury to herself, in the names of herself and husband. *Snell v. Westport*, 9 *Gray* 321. And this, after they had determined that she was not competent when her husband alone was the party. *Barber v. Goddard*, *Ibid.* 72.

The cases as to the right of a discovery from a married woman in courts of equity, are expressly put upon the ground that her evidence would charge or benefit her husband; and I find no case in which she has been protected from discovery, where the question was as to her own rights, and her hus-

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band was joined for form, or because he was a necessary party. In the cases where she has been protected, the courts, in their reasoning and distinctions, place it on the ground that it is the rights of the husband that are to be affected by her testimony; and in the cases where discovery from her was sought and refused, to sustain actions against her husband for debts due from her before marriage, the husband was the real and only party interested. 1 *Daniell's Chan. Prac.* 144; 2 *Story's Eq. Jur.*, § 1496.

In *Barron v. Grillard*, 3 *Ves. & B.* 166, the Chancellor says: "The husband is in this case the responsible party, and the wife is made defendant merely for form. The question then, is whether a discovery from her can be compelled. No single case of discovery *merely* has been cited. The general principle is, that the wife shall not give evidence against her husband."

In *Le Texier v. Margrave and Margravine of Anspach*, 5 *Ves.* 322, and 15 *Ves.* 159, on demurrer to discovery by the wife, the court held the question to turn on the fact, whether the wife acted as the usual household agent of her husband, or whether she had made a substantial contract with him, herself.

In *Wrottesley v. Bendish*, 4 *P. W.* 236, it was taken for granted that, by the settled practice, the wife must answer when made a co-defendant with her husband, and Lord Chancellor Talbot says: "But, as in all times heretofore, the wife, as well as the husband, has been compelled to answer, I would not take upon myself to overthrow what has been the constant practice."

Besides, if this was not settled by authority, the consequences of protecting the wife from answer and discovery would, under the change of the law as to married women, be disastrous, and protect outrageous frauds; and are such that in a new question should settle it against the protection. A married man could, by any fraud, possess himself of property or securities, and by taking them in name of his wife, could protect both her and himself from answering, and thus avoid

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that discovery which is one of the most effectual means of administering justice in this court.

No demurrer, therefore, could protect the defendant, Delilah Metler, from answering and making discovery. The same reasoning would protect the defendant, Orison Metler, from making discovery that might be used against his wife, who is the real defendant, did not the proviso in the act of 1859, excluding the wife, imply, upon settled principles of interpretation, that the husband might be a witness against his wife. By this implication, ever since the passage of this act, in divorce cases in this court, the husband has been admitted as a witness against his wife, and the wife has been admitted upon the implication arising from the exception in this proviso.

The court will see to it on the hearing of the cause, that the husband's answer shall not be used as evidence against the wife, if in any way prohibited by the rules or policy of the law.

The demurrer must be overruled with costs.*

FRENCH vs. GRIFFIN.

1. A simple representation, at the time of sale, that a lot is valuable and eligible, is but the expression of an opinion, and is never regarded as a warranty.

2. A mortgage cannot be reformed upon a prayer in the answer to a bill to foreclose. It must be by cross-bill.

Mr. Slape, for complainant.

Mr. S. A. Allen, for defendant.

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THE CHANCELLOR.

This suit is to foreclose a mortgage on lands in Salem. The defendant, in his answer, sets up two defences. The first is, that he was defrauded by the complainant in the purchase of the lot on which the mortgage was given, it being for part of the purchase money; that the complainant, in the sale, represented and warranted to him that the lot was worth three hundred and twenty dollars, and was in an eligible situation, when in fact it was not worth over one hundred and fifty dollars, and was in a very obscure and ineligible situation. The second is, that the complainant, at the giving of the mortgage, agreed to take payment in work and materials, to be furnished by the defendant in putting on slate roofs.

The proof is sufficient that the lot sold was not worth over one hundred and fifty or two hundred dollars, and that the situation was not among the most eligible in the town of Salem. But the proof of representations by the complainant on these matters is very meagre and unsatisfactory. Take it in the strongest view that can be taken of it for the defendant, it amounts to nothing more than *simplex commendatio*, a representation that the lot was a good and valuable one, which is the accompaniment of almost every sale, and has been from the time of Solomon until now. It is not intended or received as more than the expression of an opinion, and is never regarded as a warranty. There are few consideration money mortgages that could be collected without dispute and deduction, if courts were bound to reduce the value at which the seller estimated or represented the land sold, to the value that it was worth in the opinion of the court or the witnesses.

As to the agreement alleged to be made at the making of the mortgage, that it was to be paid in slate roofing, there is no proof. The defendant swears himself, that such agreement was not made then. The witness, Crane, says that complainant told him he was to take it out in roofing. This may

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as well refer to an offer made some time after as to one at the giving of the mortgage. Rusling, who was by at the execution of the mortgage, and who drew both deed and mortgage, does not prove it. The only proof is that in the negotiations about the sale of another lot, there was an offer by complainant to take out one hundred dollars of the price in roofing. But that contract is by no part of the proof transferred to the bargain for this lot. If such a bargain had been made, either before or after the execution of the papers, it could not affect this case; if made before, it would be considered as changed and abandoned by the mortgage being given for payment in money, and not in work; if made afterwards, it could have no effect, because without consideration, and because the effect of a sealed instrument cannot, even in equity, be changed by a parol contract. If such bargain had been made at the time of the contract, it could not at law affect or change the written instrument. Nor could it have any effect in equity, except as giving a foundation to a suit to reform the instrument, and correct the mistake in drawing it. In this case there is no cross-bill, and the mortgage cannot be reformed upon a prayer in the answer to a bill to foreclose it. And were there a cross-bill, there is no proof that it was the agreement or intention of the parties to have the mortgage drawn differently from its present shape. The proof is that the defendant heard it read, understood its purport, and discussed the time of payment.

The complainant is entitled to a decree for the sale of the mortgaged premises, and to a reference to ascertain the amount due on the mortgage.

Pope v. The Town of Union.

POPE vs. THE TOWN OF UNION.*

1. If the owner of a tract of land lays it out in lots and streets, by a map publicly exhibited or filed in the proper public office, and sells lots laid out on said map by a reference thereto, he thereby dedicates to the public those streets on said map, along which lots have been sold. Such dedication does not make them public streets or highways until the proper municipal authorities have accepted them as such, or in some way ratified the dedication.

2. The proper municipal authorities charged with laying out and maintaining streets, have the right, on the part of the public, to take and appropriate the lands so dedicated, for the purpose for which they were dedicated, and to grade and construct streets and highways upon them without further compensation; or in cases where it is required to vest the title in the public, upon a nominal consideration.

3. The map or conveyance may qualify the dedication. But laying out land in lots and streets, clearly marked as such, and selling lots bounded on such streets, without any qualification, must be held as an absolute dedication.

4. An intention to qualify the dedication concealed within the breast of the owner, or not expressed in some way on the map or in the conveyances, cannot be regarded.

5. Whether a contemplated street would not be unwise and injudicious, and even if it would be productive of great injury to private property, cannot be considered by this court. It is a matter exclusively within the province of the municipal authorities.

6. Whether the proceedings of municipal authorities have been according to law, is within the jurisdiction of the courts of law.

Mr. Lyon, for complainant.

Mr. Abbett, for defendants.

THE CHANCELLOR.

The complainant asks for an injunction to restrain the town of Union from opening and grading a street across his property in that town.

The town has municipal powers to open, grade, and level streets, and assess the cost on the lands benefited; and it has passed an ordinance for it in this case.

* CITED in *Clark v. Elizabeth*, 8 Vr. 125.

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The complainant objects, in this case, on the ground that the street intended to be opened across his lands is not a public street, and that leveling and constructing the street at the grade fixed by the ordinance will, in some places, excavate in front of his lots to the depth of twenty feet, and fill up in other places in front of his lots to the height of twenty feet, which will make these lots of no value, or nearly so.

He alleges that, in 1862, he filed in the county clerk's office a map laying out his lands in streets and lots, and that the place where this street is intended to be leveled and graded, was laid out on said map as a street, and was called on said map Durham avenue.

It is to be implied from the statements of the bill and the allegations in the answer, that he sold lots on the tracts so laid out, including lots fronting on this street, to the amount of at least half of the whole front.

The bill states that from the nature of the ground this street was not intended as a highway or street for the use of the public, but only as a mode of ingress and egress for those who might reside on the line of the same; and that a street at any grade that it could be constructed, or at the grade at which this is proposed to be constructed, would be so steep as to be of little use as a street. A copy of the map filed is annexed to the bill.

It is now well settled, by repeated adjudications in England and this country, that if the owner of a tract of land lays it out in lots and streets, by a map publicly exhibited or filed in the proper public office, and sells lots laid out on said map by a reference thereto, he thereby dedicates the streets on said map to the public. At least streets on said map along which lots have been sold are so dedicated.

This dedication does not make them public streets or highways until the proper municipal authorities have accepted them as such, or in some way ratified the dedication.

But in all these cases the proper municipal authorities charged with laying out and maintaining streets, have the right, on part of the public, to take and appropriate the

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lands so dedicated, for the purpose for which they were dedicated, and to grade and construct streets and highways upon them without further compensation; or in cases where it is required to vest the title in the public, upon a nominal consideration.

In all these cases, the map or conveyance may qualify the dedication. For dedication is by the act of the owner, and depends on his intention as expressed.

But laying out land in lots and streets clearly marked as such, and selling lots bounded on such streets without any qualification, must, both upon principle and authority, be held as a dedication to the public, as streets. An intention to qualify the dedication concealed within the breast of the owner, or not expressed in some way on the map or in the conveyances which are the evidence of, and constitute the dedication, cannot be regarded. The dedication is absolute.

The situation of the ground, as it was impracticable to construct a public street upon it for public purposes, might perhaps qualify the dedication. But from the answer and affidavits in this case, I am satisfied that such is not the case here. It may be a very steep and inconvenient street, but cannot be more so than many public highways and the public streets in many cities. The construction of it may injure many of the lots of the complainant and of others, and perhaps destroy their value, but that will not be held to qualify the dedication, as the advantage to the residue of his tract laid out may have made it his interest to destroy some lots to benefit the others.

The town council, who have authority to accept this dedication, have done so by passing the ordinance complained of and annexed to the bill. The resolution, on their part, to grade and improve it as a public street, must be held to be an acceptance of it. The mere working of land opened and thrown out as a highway, by the public officers, has been held an acceptance.

The other ground of complaint, that the improvement is unwise and injudicious, and is directed to be made in such

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manner as will do great injury to private property, is one that cannot be considered here. The matter of improving streets is properly entrusted to the local municipalities chosen by the inhabitants. They are better informed as to the facts and circumstances, and are no doubt more capable of forming a correct judgment upon the facts, than the courts can be. At all events, the law confers this power exclusively upon them, and were I thoroughly convinced that the projected improvements were injudicious, unwise, and productive of much more injury than good, I could not interfere with their discretion.

It is also beyond the jurisdiction of this court to examine and determine whether the proceedings of the council have been in all things according to law. That can and must be reviewed in the courts of law.

The injunction applied for must be denied.

PETRIE vs. VOORHEES' EXECUTOR and others.

1. A court of equity has power, in cases where there is a clear debt or duty to be paid or performed by the testator or his executors at a future day, to order that sufficient assets for the discharge of it be retained and secured by the executor, before distribution of the estate. There is no adequate remedy at law in such case, and the creditor ought not to be left to follow the legatees, or resort to the refunding bonds for the share of each.

2. An indenture of apprenticeship, with covenants valid in the state where executed, will be enforced in the courts of this state, if not *contra bonos mores*, or against the policy of our law. The personal status of each individual is governed by the law of actual domicil.

3. In general, executors are bound by all covenants of the testator, except such as must be performed by him in person.

4. In a contract of apprenticeship the covenant to support must be limited to the time of service, and cease when that ends. But the principle must be settled at law, and unless the right is so settled the aid of this court cannot be extended to prevent the distribution of the master's estate to protect a doubtful claim.

5. To bar a claim against an estate, under the rule limiting creditors,

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(*Nix. Dig.* 589, § 70,) there must be proof that the notice was advertised or set up as required by law.

6. A provision made by a master in his will, for the support of his apprentice, if liberal according to his circumstances and her condition, must be taken to be a satisfaction of his obligation to support her.

Mr. W. J. Magie, for complainant.

Mr. Ludlow, for defendants.

THE CHANCELLOR.

The complainant, Rosina Petrie, an inhabitant of the state of New York, had been placed by her mother under the control of the American Female Guardian Society, a corporation of that state. That society, by indenture, dated October 4th, 1860, bound her, then being a few days over four years old, an apprentice to Abraham V. N. Voorhees, of the city of New Brunswick, in this state, the testator of the defendants, to serve and dwell with him as an apprentice until she should arrive at the age of eighteen years. The indentures, which were under seal, were executed by the society and the testator, and not by the infant. The society covenanted that she should serve Voorhees during that time on all lawful business, according to her power, wit, and ability. And Voorhees covenanted with the society that he would provide for her during that term, "competent and sufficient meat, drink, and apparel, washing, lodging, mending, and all other things necessary and fit for an apprentice, and teach and instruct, or cause her to be taught and instructed, to read and write, and so much of arithmetic, spelling, and grammar, as is needful for persons in the ordinary ranks of life;" also, that at the end of the term, he would give her a new bible and fifty dollars in money; and also, that during the term he would cause her on Sunday to attend public worship and Sunday school, and frequently to read the Holy Scriptures aloud; that he would not suffer her to be absent from his

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service without leave, or to haunt taverns or theatres, or to play at any unlawful game.

The indenture stated that although it binds the child strictly as an apprentice, it was the intention of the parties that she should be received and reside in the family as an adopted child, and be treated with like care and kindness as if she were the child of Voorhees. This instrument was executed in New York, and the society had, by the laws of that state, power thus to bind the child, and both parties were bound by its covenants, whatever may be their legal construction.

The testator received the complainant into his family at New Brunswick, and she continued with him, serving under the indenture, until his death, October 29th, 1863.

He left a will, which was duly proved by the defendants. Having no children, and an estate amounting in all to about thirteen thousand dollars, after giving specific legacies to the amount of three hundred and forty-five dollars, he bequeathed to his wife two thousand dollars in money, and directed his executor to place four thousand dollars at interest, and pay to his wife during her life the interest, and so much of the principal as she should ask for her support. And at her death he ordered one half of the principal to be paid to the complainant, or if she was dead, to her issue; the other half to his own sisters and brothers. He gave the complainant, besides, a melodeon; and further directed his executors to place one thousand dollars at interest, and appropriate the interest to the support of the complainant until twenty-one, and then to pay her the principal, or to pay the same to her children if she should have died leaving issue; if no issue, to his brothers and sisters. After divers pecuniary legacies following these in the will, all which he directs, in case of deficiency of assets, to be paid in the order in which they stand, he directs the residue, if any, to be invested and disposed of as the sum of four thousand dollars is directed to be invested and disposed of, which gives, at the death of his wife, one half of it to the complainant.

His debts exceeded three thousand one hundred dollars,

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and these, with the specific legacies, and the seven thousand dollars given to his wife and the complainant, leaves less than twenty-five hundred dollars for expenses of administration, and the other pecuniary legacies. This sum is insufficient to pay them. There will be no residue, and the legacies last in order will not be paid.

The defendant, Garret G. Voorhees, who alone has answered the bill, was the father of the testator, and was the acting executor. He had taken and advertised the ordinary rule for the limitation of creditors, and had given notice of presenting the final account for settlement and allowance. At this point the bill in this case was exhibited by the complainant, through Rosetta Voorhees the widow of the testator, as her next friend, to restrain the allowance of the final account and the distribution of the estate according to the will, and to have a sufficient amount of the estate first set aside and secured to enable the executor to fulfil the covenants entered into by the testator for her support, maintenance, and education, until eighteen years of age.

The first question is as to the jurisdiction of the court to grant this relief. A court of equity has power, in cases where there is a clear debt or duty to be paid or performed by the testator or his executors at a future day, to order that sufficient assets for the discharge of it be retained and secured by the executor, before distribution of the estate. There is no adequate remedy at law in such case, and the creditor ought not to be left to follow the legatees or resort to the refunding bonds for the share of each. 2 *Story's Eq. Jur.*, § 846; *Johnson v. Mills*, 1 *Ves., sen.*, 282.

It is next objected that this indenture, not being executed according to the statute of this state, is void here, and no remedy can be had upon it in our courts. But the well settled rule is, that the validity of a contract depends upon the law of the country where it is made; the *lex loci contractus* governs. The indenture and covenants in it were valid in the state where they were executed, and will be enforced in our courts, if not *contra bonos mores*, or against

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the policy of our law. The *personal status* of each individual is governed by the law of actual domicil. And perhaps a question might be raised, whether the complainant, when living in New Jersey, could be held to service under such an indenture; but its covenants, with which alone we have to do, would be binding on both parties in our courts. If, ten years since, a man who had been lawfully sold in Georgia, had been voluntarily brought into New York, his status of slave in Georgia would, by the law of New York, been changed into that of a freeman; but a note for the price, or a covenant of warranty in the bill of sale, valid by the law of Georgia, could have been sued upon in the courts of New York.

It is further objected that the covenants in this indenture on part of the master, are personal, and that the obligation to serve is only to him personally; that the apprentice is not bound to serve his executors or legatees; that neither Voorhees in his life, nor his executors now, can assign the apprenticeship; and that the covenant to support must end with the correlative obligation to serve, which is the consideration for it.

It is clear, both upon principle and authority, that the obligation to serve is personal, and ends with the death of the master. In England the law has long been so settled, except that by the custom of London, apprentices in the city may be assigned upon the death of the master. But on the other hand, it is held that the covenants in the indenture are independent, and that the covenant to support binds the executors of the master.

In *Rex v. Peck*, 1 *Salk.* 66, and 1 *Burns Inst.* 92, *Title Apprentices XI*, it is said that an action might be maintained against executors on covenants to maintain after the death of the master; but this is not the point debated in that case. The order of the Sessions against the executors for support was quashed. And in the recital, in the act concerning parish apprentices, 32 *Geo.* 3, *ch.* 57, it is stated that the covenant to maintain, continues after the agreement for service

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is at an end by the death of the master, "*or doubts have arisen with respect thereto.*"

In *Winstone v. Linn*, 1 B. & Cress. 460, in *Phillips v. Clift*, 4 Hurlst. & Nor. 168, and *Powers v. Ware*, 2 Pick. 451, it is held that the covenants in an indenture of apprenticeship are independent, and that a single breach on part of the apprentice, or his inability by sickness to serve, would not discharge the master from his covenant to maintain; but it is intimated that continued wilful absence might. In *The Commonwealth v. King*, 4 S. & R. 109, it is intimated that executors are not liable on a covenant to maintain. The case of *Baxter v. Burfield*, 2 Str. 1266, has nothing on the point except a reference (evidently misreported, because incorrect) to the case of *Hyde v. Dean of Windsor*, Cro. Eliz. 552. It is clear that, in general, executors are bound by all covenants of the testator, except such as must be performed by him in person, whether named or not. 1 *Pars. on Con.* (5th ed.) 127; *Platt on Cov.* 454; 2 *Williams on Ex'rs* 1561.

But this is not the question here; but whether, from the nature of the contract, the covenant to support must not be limited to the time of service, and cease when that ends. This is the view taken by Judge Reeve in his treatise on *Domestic Relations*, p. 345. It seems to me that a correct application of the usual rules of construction to such contracts, should limit the contract to support in this way. Else the injustice and absurdity would follow, that upon the death of his master an apprentice having years to serve, could call upon his master's executor for board, clothing, and pocket money, as covenanted, and spend his time in idleness, or in other service; and the estate of an honest mechanic, who left half a dozen apprentices with five years to serve, would be eaten up in their gratuitous support, and his wife and children left penniless; and this too, when he had maintained them during the first unremunerative years of their service. The case in *Salkeld*, which is the only one produced on this point, does not adjudge the point. The court was not called upon to consider it, and is not of sufficient authority for me to consider the law so settled, against what I conceive to be

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the correct principles of construction. The principle must be settled at law, and unless the right is so settled, the aid of this court cannot be extended to prevent distribution to protect a doubtful claim.

As to the defence set up in the answer and proof, that the claim is barred by the order of the surrogate to present claims within nine months, under the twenty-second section of the Orphans Court act of 1865, (*Nix. Dig.* 589, § 70*), it is sufficient to say that no proof is given that the notice was advertised or set up as required by the act. This is essential to make it a bar. That act requires no refunding bond; and as it protects the executors from all further suits, did the notice appear to have been duly advertised, it would have been a bar to the relief sought by this suit.

Another defence is, that the provision made in the will of the testator, must be deemed a satisfaction of this claim. Besides the melodeon, and the legacy of one thousand dollars when she becomes of age, and of two thousand dollars and one half of the residue at the death of the widow, the interest of the one thousand dollars is left for her support.

This was no doubt intended by him as a provision for the support he had agreed to furnish her, and if adequate, must be taken to be a satisfaction of his obligation to support her. *Van Riper v. Van Riper*, 1 *Green's C. R.* 1; 2 *Story's Eq. Jur.*, § 1119. Its adequacy cannot be measured by the usual rule, which is that the legacy must be equal to the debt. Here the interest may or may not be equal to her support. And as this must be construed to be intended in lieu of his covenant to support her, and by the rule that any person who claims or accepts any benefit under a will must abide by its provisions, it is a case in which the complainant must be put to her election; she must either renounce all the provisions of the will in her favor, or accept of this interest as a satisfaction of her maintenance. No one can elect for her, and this court could not assume or sanction an election, unless it appears for her benefit.

* *Rev.*, p. 764, sec. 62.

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In the first place, the maintenance to be given by this indenture is only such as is to be given to an apprentice. The words of the indenture are "necessary and fit." The education is limited; so much as is *needful* for persons in the ordinary ranks of life. And I shall take it that it must be a support connected with her performing the duties on her part in the indenture, serving on all lawful business. The sixth section of the charter of the society which gives validity to this indenture, directs that it shall be conformable to the laws of New York in regard to the binding out of indigent children, and those laws provide that upon the death of the master his executors may assign the apprentice. 3 *Rev. Stat. N. Y.*, (5th ed.) p. 254, §§ 41-2.

And it strikes me that such support, as the complainant is now ten years of age, may for the average of the residue of the term, be provided by the interest of one thousand dollars. At all events, it would not be wise for her to renounce the melodeon and the legacies of three thousand dollars provided, for any excess in the support that could be allowed her out of the estate, over the interest.

The claim set up for the complainant, even if recovered by law, must rest upon a rigid and unrighteous construction of the covenants in the indenture, and is, under the circumstances of the case, an unfair and inequitable one. The testator died worth about ten thousand dollars in clear estate. Besides some trifling specific bequests, he gave his widow the control of six thousand dollars; to the complainant one thousand dollars, and a further contingency in two thousand dollars more, on the death of his widow. The residue he left to his relations. He provided for the complainant what seemed to him, and what really is, a liberal provision for her, in his circumstances and her condition. The attempt is to deprive his relations by blood, by a strict construction of the instrument and a liberal enforcement of its supposed provisions, of all the benefits he provides for them in his will.

Such a construction of this indenture, and such an enforcement of its provisions, would, as soon as known, prevent all

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proper persons from accepting any of these unfortunate children.

The views taken of the effect of the covenants in the indenture, and of the legacies to the complainant as a satisfaction of the claim, must compel me to refuse the relief asked for by the bill. The injunction must be dissolved, and the bill dismissed; but under the situation of the complainant, and the circumstances of the case, without costs.

TORREY vs. THE CAMDEN AND ATLANTIC RAILROAD COMPANY AND THE RARITAN AND DELAWARE BAY RAILROAD COMPANY.*

1. A suit on a written contract, for the contract price for work and labor done, if the work has been performed according to contract, or if it has not been so performed, and the party for whom it is done has dispensed with the contract in some particulars, or has accepted and used it, and the same is a substantial advantage to him, must be brought at law.

2. An injunction will not be granted, where it would cause great injury to the defendants, and might be of serious detriment to the public, without corresponding advantage to the complainant.

Mr. C. Parker, for complainants.

Mr. Ashbel Green, for defendants.

THE CHANCELLOR.

Samuel W. Torrey and William A. Torrey, the complainants, file their bill to compel the defendants to pay for a branch railroad, constructed by them for the Camden and Atlantic Railroad Company by contract, and to enjoin the Raritan and Delaware Bay company from using the branch until it is paid for. The branch road is about nine miles in length, and runs from Jackson, on the Camden and Atlantic road, to Atsion, on the Raritan and Delaware Bay

* CITED in *Scanlan v. Howe*, 9 C. E. Gr. 277.

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road. The object of it was to allow continuous trains to run from the northern terminus, or any intervening point on the Raritan and Delaware Bay road, to the western terminus, or any intervening point on the Camden and Atlantic road. By an agreement between these companies, this branch was to be constructed by the Camden and Atlantic company, by contractors designated by the Raritan and Delaware Bay company, at an expense not exceeding fifteen thousand dollars per mile, including the purchase of the right of way. The cost of construction was to be paid for by applying to that purpose ten per cent. of the gross receipts of the former company out of the joint traffic on the two roads, the division of which was provided for by the same agreement, which was dated October twenty-eighth, 1861.

On the tenth day of April, 1862, the Camden and Atlantic company contracted with the complainants, who were designated for that purpose by the other company, to construct the said road for fifteen thousand dollars per mile, to be paid for by the ten per cent. of the share of the Camden company out of their joint traffic, as settled by the agreement of October, 1861. The road was to be constructed according to specifications, and was to be finished by the first day of January, 1863. The contract provided that the road, when finished, should remain the property of the complainants, and in their possession, and under their control, until paid for.

The branch was built by the complainants within the time required by the contract, but not in all things according to the specifications; and after it was built, the Raritan and Delaware Bay company, which was then controlled by the complainants who owned most of the capital stock, commenced using it for the common business of the two companies, which business, by a modification of the contract of October, 1861, was carried on by the Raritan and Delaware Bay company.

The two companies, by a subsequent modification of that agreement, changed the mode of dividing profits and abolished the monthly settlements, and thereby the complainants charge

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that the gross earnings, out of which they are to be paid one tenth, cannot be ascertained.

The Raritan and Delaware Bay company made a subsequent arrangement with the complainants to pay them a certain sum periodically, but this they have ceased to pay.

The complainants pray that the defendants may be compelled to pay them for their road according to the contract price, after making deductions for deficiencies; and that they may be enjoined from using the road until paid for.

The Camden and Atlantic company, in their answer, admit the contract with the complainants, but deny that complainants have built the road according to contract, or that they have accepted the road, or have at any time used it; and answer that they have refused, and do refuse to accept or pay for it.

The Raritan and Delaware Bay company admit the contract between the companies, and with the complainants, but deny that the road was built according to contract. They admit the use of the road, which they say commenced by an understanding between the complainants and that company, when the complainants controlled said company. They state that the complainants afterwards sold their stock in said company to the shareholders, who now hold it and comprise a majority of the company, upon the representation that said branch was properly constructed and was part of the works and road of the company, and that without such understanding they would not have purchased it; that a great part of the business on said road depends upon the use of said branch, and that it would be inequitable, on part of the complainants, to enjoin the use of it. They deny that the road was built according to contract, or that the complainants have acquired the title to the right of way, or can convey it, or that the Camden company have accepted the road. They deny that the business is so conducted that the share of the Camden company cannot be ascertained according to the agreement of October, 1861, or that the ten per cent. of the complainants cannot be ascertained; and aver that the total amount

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of such share of the gross receipts is eighty-one thousand dollars, and the amount that would be due to the complainants on their contract would be eight thousand one hundred dollars ; and that they, the Bay company, have paid them, on account thereof, over thirteen thousand dollars, being five thousand dollars in excess of the amount that would be due under their contract, if fulfilled.

Without considering the merits of the controversy between these parties, from the facts set forth in the pleadings, it seems to me that the claims, or either of them, made by the complainants, are not proper subjects of equity jurisdiction.

The claim against the Camden company is on a written contract for the contract price of constructing their road. If the work has been performed according to contract, or if it has not been so performed and the Camden company has dispensed with the contract in some particulars, or has accepted and used the road, and the same is a substantial advantage to them, the complainants can recover at law ; and if not entitled to recover at law, they cannot recover in this court.

If they have procured the right of way, and constructed this road upon it, and the Camden company have not accepted or paid for it, the road and land upon which it is built, as between these parties, is their property ; if in their possession, they can exclude the Bay company from entering on or passing over it, or maintain trespass at law ; if not in their possession, and they have not let it to that company, they can, as against them, recover by ejectment the possession.

There is no occasion for a riot or dangerous force, any more than if the subject matter was a farm or a factory. And it is not one of the cases in which an injunction will be granted to restrain a mere trespass.

There is no irreparable injury done to the complainants by the use of their branch road. It is utterly useless for any other purpose. No other company can use it. The Bay company, if a recovery is had, can be compelled to pay for the use of the road, and the injury done by wearing it out, if they

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do not keep it in repair. An injunction, by interrupting the traffic carried on over this branch, would not only cause a great injury to the defendants in the use of their main roads, but might be of serious detriment to the public, with no corresponding advantage to any one.

The injunction must be denied.

BIRD vs. STYLES.

Where a bill is filed for relief upon an alleged agreement, and the answer denies such agreement, the complainant must prove it by two witnesses, or evidence equal to two witnesses.

Mr. J. V. Voorhees, for complainant.

Mr. B. Williamson, for defendant.

THE CHANCELLOR.

The object of this suit is to set aside a sale of the complainant's lands, made to the defendant, and to compel a reconveyance of the same. The sale was made by the sheriff of Somerset, by virtue of an execution upon a judgment obtained in the Somerset circuit against the complainant, by Isaac Bird, for four hundred and fifty-nine dollars and fifty-seven cents, on the thirteenth day of October, 1859. A deed was given by the sheriff, and the defendant, Styles, obtained possession by ejectment.

The complainant, in his bill, alleges that the defendant conducted the suit in the Circuit Court for Isaac Bird, on an agreement that he, Styles, was to be at the trouble and expense of the suit, and was to receive half of what might be recovered; that after judgment, he paid Styles one hundred dollars on the judgment, upon an agreement that there should be no sale, but that he should give security for the residue of the judgment, and that the judgment should then be as-

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signed to him ; that after this agreement, he arranged with one Compton to advance the money for him, but the defendant interfered with Compton, and he declined to advance the money ; that he, the complainant, arranged with his brother, David Bird, to buy the property for him, but the defendant, a few days before the sale, told David Bird that the sale would be put off or would not take place, and David did not attend, and the defendant, at the sale, bought the property for four hundred and seventy-five dollars, the same being worth much more than that sum ; that after the sale he asked Styles if he would carry out his bargain with him ; Styles agreed to do it, and told him to go on with the completion of his house ; and that on this assurance, he went on and spent fifty dollars in completing his house.

The defendant, in his answer, denies that he made any such bargain with the complainant, or any bargain at all, otherwise than agreeing to take the money in payment of the judgment.

The complainant, after this responsive denial, is bound to prove the agreement by two witnesses, or evidence equal to two witnesses. He fails to do it. There is no direct proof of it except the complainant's own testimony, and his testimony as to the agreement is vague, uncertain, contradictory, and variant from the agreement alleged in the bill ; and the proof in support of any agreement, outside of the complainant's testimony, is trifling and indirect. It is impossible, from the evidence in the case, to select any that amounts to the testimony of two witnesses, in support of an agreement at all ; and there is no testimony that satisfies me, independent of the denial in the defendant's answer, that there was any agreement at all. I mean an agreement of a fixed character, such as if it was reduced to writing, could be enforced at law or in equity.

If there had been any agreement, it is proved that the complainant told the defendant just before the sale that he could not raise the money within a year, and he might as well go on. This is distinctly sworn to by two witnesses, be-

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sides the defendant. The complainant denies it; but the weight of testimony is against him. The fact that the complainant, after this sale, was quiet for two or three years, suffered an ejectment suit to dispossess him, and filed no bill, though not a bar to this suit, seems to me to be a strong circumstance against the credibility of his whole story.

The fact shown in the testimony of the complainant himself, that before the judgment obtained by Isaac Bird against him he had conveyed these lands to his father, John G. Bird, and that John G. Bird had conveyed them to a daughter of the complainant, would be a bar to any relief for the complainant in this suit. It is a difficulty that cannot be avoided by amendment. And if it is true, as sworn to by the complainant, that the conveyance by him was for the purpose of defeating Isaac Bird in the recovery of his debt, no suit could be maintained in this court by any grantee under such conveyance.

As the suit stands, a decree against Styles for a re-conveyance would be of no benefit to the complainant, as Styles, before the bill was filed, had conveyed the property away. The deed was not recorded until after the bill was filed. But the registry acts do not provide for this case. They only make an unrecorded deed void as against a subsequent purchaser, mortgagee, or judgment creditor, not as against the complainant in a suit in equity. And it is held not to be void as against an attachment creditor, if recorded before final judgment in the suit.

An amendment of the bill in this respect would be of no avail, unless better evidence could be produced of notice to the purchaser, than is now in the cause.

The complainant's bill must be dismissed with costs.

C A S E S

ADJUDGED IN

THE COURT OF CHANCERY

OF THE

STATE OF NEW JERSEY.

MAY TERM, 1867.

AGATHA FISCHER vs. HENRY FISCHER.

In a bill for divorce *a mensa et thoro*, and for alimony, on the ground of extreme cruelty, the complainant has the burthen of proof, and must sustain her case by something more than equally balanced testimony.

Mr. Stone and *Mr. Jackson*, for complainant.

Mr. Williamson, for defendant.

THE CHANCELLOR.

The bill is for a divorce *a mensa et thoro*, and for alimony, on the ground of extreme cruelty.

The facts charged in the bill as constituting the extreme cruelty, are denied in the answer. The issue is upon these facts.

There are only two witnesses, the complainant and defendant. The defendant, in his testimony, fully denies all the facts proved by the complainant that could make a foundation for the decree. The complainant has the burthen of proof, and must sustain her case by something more than equally balanced testimony.

The bill must be dismissed, but without costs.

Scott v. Lalor's Executors.

SCOTT vs. LALOR'S EXECUTORS.

1. In general, a defendant cannot have any positive relief against the complainant, even as to the subject matter of the suit, except by cross-bill.

2. But where the complainant bases his right to relief upon an agreement for farming on shares, and prays for an account and equal division of part of the proceeds taken by the defendant, the defendant is entitled to an account of so much as has been received by the complainant, and will not be compelled to file a cross-bill for that purpose.

Mr. E. T. Green, for complainant.

Mr. E. W. Scudder, for defendant.

THE CHANCELLOR.

By an agreement reduced to writing, but not signed by the parties, Lalor demised to Scott for one year, a farm to be worked on shares, one-half of every thing raised or sold by Scott, to belong to each. At the end of the year, which was at the usual time in farming leases, the first day of April, Scott left the premises, having sown the usual winter crops. The next summer Lalor, without the consent, and against the remonstrances of Scott, gathered these crops without giving Scott one-half. The bill is filed for an account of that crop; it was filed in the life of Lalor; he having died, his executors have been substituted in his place. Lalor's answer, made in his life, admits the lease, the gathering of these way-going crops, and that he did not share with Scott. But he sets up in defence, that Scott had not divided the other crops fairly, but had kept the greater share; and that he had, against the express terms of the lease, mismanaged the farm. He is willing to account for one-half the grain taken by him, deducting the expense of gathering, but insists upon having an account of the whole dealings under the lease, and that Scott shall not be entitled to recover anything by virtue of the lease, unless upon a fair account of the whole matter.

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Scott contends that these matters cannot be taken into consideration in this suit; that it can only be done by filing a cross-bill.

In general, the position taken by the counsel of the complainant is correct, that a defendant cannot have any positive relief against the complainant, even as to the subject matter of the suit, unless a cross-bill is filed for that purpose. But I think this case is not within that rule. The complainant bases his right to relief upon the lease, and prays for an account and equal division of part of the proceeds taken by defendant. It is not necessary to hold that an agreement for farming on shares is a partnership, but each party, as in a partnership, in such case is entitled to come into this court for an account. And it is equitable that when one party calls upon the other to account for part of the proceeds received by him, that the party asking an account should render an account of what he had received. Else, though each had received an equal proportion of the whole, one might be compelled to pay over part of it to the other, and be compelled to bring another suit. Besides, equity will consider that the complainant ought not to receive anything by virtue of this lease, unless he has substantially performed his part of it.

Let it be referred to a master to take an account between the parties, of the grain taken by Lalor after the end of the term, and of the cost of gathering it; and of the amounts raised and sold by Scott during the term, and of the part delivered to Lalor. The damages by bad husbandry are not to be considered. The testimony taken in the cause to be used before the master. But the evidence of Scott, except so far as it contradicts the responsive allegations in Lalor's answer, is not to be used before the master, or for any other purpose in the cause.

Tompkins v. Tompkins' Executors.

TOMPKINS vs. TOMPKINS' EXECUTORS.

1. A father is bound to support his infant children, if of sufficient ability to do so, though they have estates of their own, given expressly for their maintenance; if he is not able to support them, so much of the income of such estates as is necessary, will be ordered to be applied to that purpose, though bequeathed with directions to be accumulated during minority.

2. Where infant children have, by their father, filed their bill alleging his inability to support them, and praying income from their estates for that purpose, the fact of their father's ability will be inquired into and determined by the court; the admissions of the answer are not sufficient.

Mr. J. W. Taylor, for complainants.

Mr. Ranney, for defendants.

THE CHANCELLOR.

In this case Elias Tompkins, by his will, gave to the children of his son, Daniel F. Tompkins, a certain portion of the residue of his estate; this he directed his executors to invest for the benefit of the children of Daniel, and to divide the same equally between them as they shall respectively come to the age of twenty-one years. The complainants, Abigail and Emma Tompkins, are the only children of Daniel, and are infants, under the age of fourteen. The bill is filed by them through their father, as next friend, against the executors of the will of Elias Tompkins.

The bill alleges that the share of the estate of their grandfather, Elias Tompkins, that will come to them, is very large; that it will amount to about fifteen thousand dollars; that their father's means are limited, yielding little or no income; that his means for the support of himself and family are derived from the fruits of his business and his personal exertions, and are scanty and precarious; and that he has not the ability to support the complainants according to their condition in life, their fortune, and expectations. The bill prays

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that the defendants may be directed to pay the income of their portion to their father, who has been duly appointed guardian of their estates, for their support.

The answer admits the facts stated in the bill, except as to the amount of the share of the complainants, which it states is between ten and fifteen thousand dollars.

The legacy in this case is vested in the complainants; and this court has power to order the income of it to be paid for the support of the children in a proper case.

The settled rule with regard to the support of infants is, that if their father is living, and is of sufficient ability, he is bound to support them, notwithstanding they may have estates of their own; even when such estates are given expressly for their maintenance. But when the father is not of sufficient ability to support them, or to support them according to their situation and expectations, this court will order so much of their own income to be applied to that purpose, as is necessary; and this will be done, even when the property is bequeathed to them with directions to be accumulated during minority.

But the fact of the father's ability must be inquired into and determined by the court; the admissions of the defendants are not sufficient. The bill, though in the name of the children, is essentially the bill of the father for his own relief. The children are too young to have any discretion in the matter, and must be considered as under their father's influence. It must be referred to a master to inquire and report what are the ages of the complainants respectively, what is the amount that they will be entitled to out of their grandfather's estate, and what is the income of their father.

Upon this report, the proper order will be made by this court.

Cross v. Mayor of Morristown.

CROSS vs. THE MAYOR, RECORDER, ALDERMEN, AND COMMON COUNCIL OF MORRISTOWN.*

1. The general act relating to roads, does not apply to towns or cities the charters of which confer on the corporations the authority to regulate the streets.

2. Where the charter of a city empowers the common council to regulate the public streets by ordinance, an alteration of the carriage-way or side-walks cannot be made by the municipal authorities without the passage of an ordinance for that purpose.

3. An encroachment upon a street or public highway cannot be legalized by the mere lapse of time.

4. Where the city authorities widened the carriage-way and cut down the sidewalk of a public street, without pursuing the formalities prescribed by their charter, it was held that such acts, not operating as irreparable injuries to the complainant, who was the owner of a house and lot on such street, did not form the basis for an injunction; the same being merely trespasses and remediable as such.

The bill in this case was filed by the complainant in behalf of himself and such other owners of lots on South street, in Morristown, as might come in and claim relief, &c.

The principal matters stated in the bill were these: that the complainant was the owner of a lot of land, on which was a dwelling-house and other buildings; that said dwelling-house stood back fifteen or twenty feet from the street fence, which fence had been erected in its present position about twenty-six or twenty-seven years ago, and had been maintained in the same place ever since its erection; that complainant had a sidewalk in front of his said lot between the said door-yard fence and the wagon-way of said South street, and not over seven or eight feet in width, and that said sidewalk had been of its present width for twenty years last past, and longer, &c.; that at the outer edge of said sidewalk complainant had growing on his own land four valuable shade trees; that said South street commences at the southerly corner of the public square in Morristown, and

* CITED in *Tainter v. Morristown*, 4 C. E. Gr. 47, 60; 4 Vr. 61; *State v. Troth*, 5 Vr. 379; *State v. Trenton*, 7 Vr. 201; *Hoboken L. & I. Co. v. Hoboken*, Id. 549.

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continues thence in a southerly direction for nearly half a mile; that said South street was an ancient highway, but had never been laid out by surveyors of the highways; that until the year 1865 Morristown was not incorporated. The bill then sets out at length sundry provisions of the act of incorporation, and its supplements, and avers that the Common Council has never passed any ordinance authorizing the widening said South street, or the sidewalks thereof, nor the removal or destruction of any shade trees between the wagon-way and sidewalks along said street, nor the removal of any door-yard fences standing between the sidewalks and the houses along said street.

The bill further charges, that the Common Council caused a survey to be made of South street, and sets out, with great particularity, the lines of the street as located by said survey, showing that it makes the said street to embrace a portion of most of the door-yards bordering on said street; and that, on the twenty-ninth of October, 1866, a notice was served on complainant, by the order of the Common Council, to the effect that the fence on his lot stood between five and six feet into the street, and requesting its removal, &c.; and that notices of a like character had been given to the other land owners whose fences were thought to encroach on the street.

The bill further charges, that the Common Council has determined to make said South street conform to said survey, and to widen the road-way, and in pursuance of such intent has commenced operations; that, besides widening the carriage-way, said Common Council is altering the grade of said street, so that in front of complainant's lot the street had been lowered about one foot; that, in widening said carriage-way, the sidewalks along said street have been considerably narrowed and made unfit for use; and that the line of the work in extending the carriage-way comes inside of the shade trees of complainant and those of the other land-owners; and that the shade trees will be dug up, or their roots will be so much uncovered as to kill them.

The prayer of the bill was for an injunction to restrain the

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municipal authorities from widening the carriage or wagon-way in said street, from narrowing the sidewalks thereof, from digging up or uncovering the roots, or in anywise injuring any of the shade trees, &c., and from removing, disturbing, or injuring any of the door-yard fences along said street, &c.

To this bill the defendants filed an answer, the substance of which sufficiently appears in the opinion of the court.

The cause came on for argument on a motion to dissolve the injunction, before the Chief Justice, sitting as statutory master, during the absence of the Chancellor from the state.

Mr. Pitney, in support of the motion.

Mr. Vanatta, contra.

THE CHIEF JUSTICE, sitting as Master.

When the bill in this cause was filed, the municipal authorities of Morristown were in the act of altering the grade of one of the principal streets of said town, called South street, and of widening the wagon or carriage-way of such street. In the doing of this work they had encroached on the sidewalks, as before established, and had dug away the earth around the shade trees standing along the outer edge of such sidewalks. The complainant is the owner of a lot and dwelling-house upon this street, and this property was subjected to this treatment at the hands of the corporate officials.

Anterior to this course of action on the part of the town, the Common Council had caused a survey of this street to be made, and finding as they supposed, that most of the owners of lots, among whom was the complainant, had encroached upon the street, had caused notices to be served on such persons, informing them of such fact, and requesting them to move back their fences and thus give to the street its proper bounds.

After a careful examination of the various legislative enactments which incorporate Morristown, or which confer upon

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it supplementary powers, I am entirely satisfied that, taken in a purely legal light, the acts of the town above enumerated are not to be justified. It is true that by the statutes referred to, very ample power to regulate the streets and sidewalks has been given to the municipality. The right thus conferred is certainly adequate to enable the town to prescribe the grade and the width, both of the carriage-ways and of the sidewalks. On the argument, indeed, it was insisted that by the act of the fourteenth of March, 1851, (*Nix. Dig.* 751*), every owner of a lot adjoining on a public highway has a right to have sidewalks "not exceeding in width one fifth, on each side of the road, of the width thereof," and that the dimensions of such sidewalk could not be curtailed against his wishes. But this act is, in substance, a supplement to the general law of the state concerning roads, and, like that law, does not apply to towns or cities, the charters of which confer on the corporation the authority to regulate the streets. By the fifty-first section of the act relating to roads, it is declared, in express terms, that whenever the word "township is made use of in the act, it shall be construed to comprehend precinct, ward, city, borough, and town corporate;" and the effect of the provision is to carry the entire system, embodied in this general statute with regard to making and repairing highways, into towns corporate and cities, in the absence of superseding regulations in their respective charters. But it has never seemed to me a matter susceptible of doubt, that in case a city charter contains a special provision, putting the streets in charge of the officers of the corporation, such provision excludes the common scheme for constructing and keeping up highways in the townships, and all its concomitant regulations. In conformity with the well known rule of law, the general legislation on the subject gives place to the special legislation on the same subject. I have no difficulty, therefore, in holding that the entire control over the public streets of Morristown, except it may be with respect to the laying out of new roads, resides exclusively in the local cor-

* *Rev.*, p. 1009.

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poration, and that such corporation has the indisputable right to prescribe the grade to the streets, and the width of the carriage-ways and of the sidewalks.

But notwithstanding this conviction, in my opinion, as has been already observed, the alterations made, as well as those attempted to be made in South street, are not to be legally vindicated. No doubt they were well intended, and designed to promote the public welfare. The illegality consists in doing the work in the absence of a town ordinance on the subject. The charter is explicit with respect to this matter. In unambiguous language, the grant of power is to the Common Council, to pass ordinances to regulate the sidewalks and streets. The power is undoubtedly conferred, but the mode in which that power shall be exercised is prescribed, and the consequence is, such mode must be pursued. No material alteration can be legally made in any street within the corporate limits, either with regard to its grade or the width of its carriage-way or sidewalks, except by force of a by-law of the Common Council, describing, with intelligible particularity, the alteration to be made. Nor is this an unusual provision; it is to be found in the charters of most of the municipal corporations of this state. Nor is it an inconsiderable one, for it is obviously highly important that all substantial modifications of the public thoroughfares should be made with care, and after due deliberation, and that before their execution they should be made known to those whose property or convenience is, oftentimes, to be very materially affected by them. As therefore, the answer of the defendants in this case admits that the proceedings in question took place without the sanction of an ordinance of the Common Council, I am constrained to regard such proceedings as violations of law.

But this conclusion does not, by any means, settle the point as to the right of the complainant to retain the injunction which he has obtained. His rights of property have, undoubtedly, to some extent been invaded. The question then arises: is that invasion of a character to justify the in-

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terference of a court of equity? To answer this inquiry, it is necessary to ascertain with precision the rights which have been infringed, and the nature of such infringement.

In the bill of complaint, the most serious of the grounds for apprehension on the part of the complainant, appears to be the action of the Common Council in directing a survey of South street, and the consequent notices to the lot owners to remove their fences, regarding them as encroachments. By the seventh section of the supplement to the charter of the town, passed March 15th, 1866, it is recited that "there are several roads, highways, and streets, within the said town of Morristown, the lines of which have not been, and cannot be certainly ascertained by reason of the indefinite surveys, plots, and maps thereof," and it is thereby declared that, for the purpose of settling such lines and courses, the Common Council may appoint commissioners, who are empowered to make, in a certain designated mode, a survey of the streets whose bounds are thus unascertained.

There is no pretence that this statutable course has been observed with respect to South street. It is conceded that no commissioners were appointed, and that all that the Common Council did was to cause one of their own officers to run the courses of an old survey of the street, which had been recently discovered upon the public records. With regard to this survey thus made, considerable evidence has been taken, and from that evidence I am convinced that this street, owing to the present obscurity as to the position of the monuments referred to in its original official location, requires, with peculiar force, the application, for the ascertainment of its proper bounds, of the method provided by the statute just mentioned. There is certainly a strong probability that the survey which has been made, is a close approximation to the actual lines of this highway, but the public has so long acquiesced in these alleged encroachments, and such encroachments are so numerous, that it appears eminently proper a course should be taken which would conduce so much to remove uncertainties, and promote general acquiescence. If

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encroachments on this public street exist, such encroachments, no matter how ancient and long continued, are clearly public nuisances, and as such, are abatable. The claim that this public easement has been curtailed by acquiescence and lapse of time, has no foundation in legal principle. Such I have always understood to be the well established rule of law upon this subject. In the case of *Fowler v. Sanders*, *Cro. Jac.* 446, it was substantially held that the common law presents no means (except an act of Parliament) by which a public right of way can be lost absolutely ; and this doctrine, so far as I am aware, has never been drawn in question by the decision of any English court.

The doctrine is embodied in the ancient maxim "*nullum tempus occurrit regi* ;" and it is applied for the protection of all public interests. Thus, in general terms, it is said, "no person can prescribe against an act of Parliament, or against the King, where he hath a certain estate and interest, against the public good, religion, &c." *Jac. L. D., tit. King*. In its application to navigable rivers, this principle has been oftentimes asserted. Thus, in *Vooght v. Winch*, 2 *B. & Ald.* 662, it was maintained that twenty years possession of the water of a public navigable river, at a given level, did not conclude the public. *Weld v. Hornby*, 7 *East* 195, was, in point of doctrine, to the same effect. And in *Chad v. Tilsed*, 2 *Brod. & B.* 403, a possession of forty years was relied on and was deemed insufficient by the court ; Chief Justice Dallas remarking : "I agree that if the usage be only of forty years duration, and be applied to establish an exclusive right over an arm of the sea, this could not destroy the right of the subject." Nor do I think the authorities referred to on the argument by the counsel of the complainant are at all inconsistent with the decisions above cited ; for all such authorities related to presumed grants of crown lands and privileges from the sovereign in his individual capacity, and not to him in his character of *parens patriæ*, and as the repository of public rights. It is true that, in this country, this rule of the common law has, in a few instances, been rejected, but nevertheless it is sus-

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tained, I think, by a great preponderance of American authority. "No laches," said Chief Justice Parsons, "can be imputed to the government, and against it no time runs so as to bar its rights." *Stoughton (town of) v. Baker et al.*, 4 *Mass.* 522. And in the more recent case of the *Commonwealth v. Upton*, 6 *Gray* 476, the same court remarks: "It is a positive rule of law, as reasonable as it is firmly established, that no length of time will legitimate a nuisance, or enable a party to prescribe for its continuance." The same principle is put in force in the following cases: *People v. Cunningham*, 1 *Denio* 536; *Mills v. Hall*, 9 *Wend.* 315.

And I regard it a mistake to suppose, as was done upon the argument before me, that the rule in question originated in the desire to extend unduly the royal prerogatives. Evidently such was not the case; but it proceeded from a regard to the interest of the public, or great body politic. It is a principle of policy, and appears to have been thought almost indispensable for the protection of those privileges in which the whole community is interested, and it may well be doubted if it does not exist, in some form, in the jurisprudence of every civilized people. "Thus," says *Domat*, *Vol. 1*, p. 492, propounding the maxim of the civil law, "we cannot acquire by prescription the things which nature or the law of nations destine to a common and public use, such as the banks of rivers necessary for navigation, the walls and ditches of towns, and other the like places." This seems to place the doctrine on the broad foundation of universal law; and it seems to me its absence from any legal system would be attended with much inconvenience, for it is almost impossible to imagine any scheme of supervision over public interests which would be adequate for their protection against the constant and yet almost imperceptible aggressions of individuals. Who is to watch, for example, so as to detect, within a certain period, all encroachments upon the innumerable public highways in the state? or who is to keep a similar guard over all parts of its extensive harbors and navigable rivers? There is much good sense in the remark of Chief Justice Cowen, contained

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in his opinion in *Dygert v. Schenck*, 23 *Wend.* 448, that "no length of time will legalize a nuisance, for the very reason that while it continues a mere trifle no one thinks of taking measures to have it removed, and thus the public will be sure to suffer." In my estimation, the rule in question is highly reasonable as well as beneficial in its effects, and there appears, consequently, no reason why it should not be received with favor by the courts. I hold, therefore, that by the law of this state, the complainant cannot set up any claim, derived from a possession continued for over twenty years, to occupy any portion of the public street in question.

But as the true boundaries of this street are open to serious controversy, and as the possession of the complainant has been of such long continuance, it seems to me that the officers of the town, unauthorized to pursue such a course by any ordinance, would not be justified in entering upon the premises of the complainant and removing his fence as a public nuisance. If such was originally the intention of the town officers, the injunction in this respect was proper, and should now be continued. But, from the answer which has been put in, it now appears that this course was never in contemplation. The defendants expressly deny that they had any design to enter upon the complainant's property, or to disturb the fences in front of it, until the proper ordinances should have been enacted. It is, therefore, manifest that an injunction is not necessary for the protection of the complainant on this head.

The next ground laid in the bill of complaint for the summary interference of this court, consists in the allegation that the defendants design to destroy the shade trees in front of the premises of the complainant. A necessity to protect ornamental trees would afford an adequate motive for the action of a court of equity, for the loss of such property is deemed an irreparable injury. But in this respect also, the answer discloses circumstances which entirely destroy this basis of relief. The answer is complete to the effect that the defendants had no intention to destroy or injure any of these

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trees. On the contrary, they show that they have not injured any tree along the whole line of the street; and that they have taken pains to avoid doing the least hurt to this species of property. This averment has not been controverted by any of the affidavits, and it consequently takes away all pretence of right to have the injunction continued on this ground.

The residue of the complainant's case is this: that the defendants have altered the grade of the street, have widened the carriage-bed, and cut away a portion of the sidewalk. It has already been said that, under present circumstances, such acts are legal wrongs, but I am entirely at a loss to see how they give to the complainant a right to relief in the form of an injunction. These are mere ordinary wrongs or torts, and the damage which they inflict it would be absurd to denominate irreparable. How, then, can this injunction stand? The rule is perfectly established, and never questioned, that in cases of this nature, a court of equity will never intervene where the remedy is adequate at law. The process of injunction has been called the strong arm of the court, and it has been often said that to render its operation useful it must be exercised with great discretion, and only when necessity requires. Nor am I aware of any class of cases to which it should be applied with greater caution, than to the proceedings of municipal corporations in the execution of public improvements. I have been referred to no case in which such a jurisdiction has ever been assumed. The right of this court to proceed by way of injunction, in an analogous case, was emphatically denied by Chancellor Green, and I entirely concur in the view there presented. The case referred to is that of *Holmes v. Jersey City*, reported in 1 *Beas.* 310.

In the present case, as now developed, there is no reason to suppose any great mischief is impending over the complainant. If he sustain any loss or damage, as apprehended by him, from any illegal act of the defendants, he can obtain ample redress by a suit in the ordinary mode, in a court of

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law. This tribunal cannot properly take cognizance of ordinary trespasses to lands.

The injunction, therefore, must be dissolved, but, under the peculiar circumstances of the case, without costs.

HOUGHWOUT vs. BOISAUBIN.*

1. An offer or proposal by one party to sell to another, unsupported by any consideration, may be withdrawn at any time before acceptance.

2. When accepted, it becomes a contract which may be enforced in equity.

3. Where one has "until" a certain day to accept, the acceptance may be made on that day, if the offer be still open.

4. If the proposal be clear and definite, and one to which a simple assent is a complete answer, such assent may be given either by writing, by acts, or by words. The statute of frauds requires the writing to be signed only by the person to be charged.

5. When the offer has been turned, by acceptance, into a contract, each party will have a reasonable time in which to perform it.

6. What delay will become such laches as to forfeit the right to enforce specific performance, must depend on the circumstances of each case. While equity requires the party who would enforce specific performance to be vigilant and prompt, it does not discourage purposes of settlement or reasonable delays for that purpose.

This cause was argued on final hearing, upon the pleadings and proofs, before Amzi Dodd, esq., one of the masters of the court.

Mr. Pitney and *Mr. Parker*, for complainant.

Mr. Vanatta, for defendant.

THE MASTER.

This bill is filed to enforce the specific performance of a part of an agreement between Eder V. Houghwout and Amidee Boisaubin, of which the following is a copy :

*CITED in *Cutting v. Dana*, 10 C. E. Gr. 274; *Scott v. Shiner*, 12 C. E. Gr. 187; *Union Loc. & Ex. Co. v. Erie R. Co.*, 8 Vr. 29.

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NEW YORK, 24th Sept., 1863.

Agreement made this day, between Mr. Amidee Boisaubin and Eder V. Houghwout, for the sale and purchase of a farm of seventy acres of ground, situate at Cedar Grove, Madison, state of New Jersey, said seventy acres of farm land lying opposite to the residence of Mr. George Pomeroy, for the sum of nine thousand dollars. Mr. Boisaubin agrees to sell, and Mr. Houghwout agrees to purchase said farm, with all its improvements, fences, out-houses, barns, &c., now upon said premises, for the sum of nine thousand dollars. Mr. Boisaubin is to give a full and clear warrantee deed for the same, and permit Mr. Houghwout to employ a proper lawyer to search the title; the cost of said search to be divided between the parties. The land is to be surveyed, and a plain map of the same to be attached to the deed, and Mr. Boisaubin guarantee that the land shall not be less than seventy acres. The examinations of the title, &c., to be made as soon as convenient, and the deeds to be delivered and payment to be made on the fourth day of November, 1863, at the office of Mr. Houghwout, 490 Broadway. Mr. Boisaubin also agrees to sell to Mr. Houghwout the plot of land of about twenty-two acres, called the Spencer woods, for the sum of two hundred dollars per acre, and Mr. Houghwout has until the first day of March, 1864, to accept of the proposition.

Mr. Boisaubin also agrees that Mr. Houghwout may go on and make improvements on the land, even before the deeds are delivered and money paid, but must not make such changes before that time as would injure the property or be objectionable to Mr. Boisaubin.

AMIDEE BOISAUBIN.

E. V. HOUGHWOUT.

Signed in the presence of
WM. MARGEORGE, JR.

The part of the above agreement which is sought to be specifically enforced, is that relating to the sale of the tract called the Spencer woods. The other tract of seventy acres was

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duly conveyed to Houghwout by Boisaubin, by deed of November 11th, 1863; the time named in the agreement having been extended, by consent, to that day.

A few days after the first of March, 1864, Boisaubin notified the attorneys of Houghwout, Messrs. Hull, Conable and Arnold, in the city of New York, that he would not convey the tract in question to Houghwout; and on the thirty-first day of August, 1865, this bill was filed to compel such conveyance.

It is resisted by Boisaubin on the grounds: 1. That the clause of the agreement relating to the Spencer woods was not, at the time the agreement was made, a *contract* between himself and complainant, but a mere *offer* or *proposal* on his part, unsupported by any consideration, and liable, at any time before acceptance, to be withdrawn or revoked.

2. That such offer or proposal was never afterwards changed into a contract by anything done on the part of Houghwout. That, in other words, it was not lawfully accepted, either in manner or time.

3. That if such offer did become a contract capable of being enforced against him in equity by the complainant, he has by his laches, lost his right to have it enforced.

Looking at the agreement by itself, and apart from the proofs, it is clear, I think, that the first position is a good one. The stipulations about the Spencer woods are termed in the agreement a *proposition*. Nothing is said from which it can be fairly inferred that the option of purchasing *this* lot, was a part of the consideration or inducement for the purchase of the other. Nor does the evidence in the cause sufficiently show that it was so regarded by the parties to the agreement whatever may have been the thoughts of the complainant, when the agreement was made. The proposal or offer might have been withdrawn at any time before its acceptance by complainant.

As to the second of these grounds, it is said by the defendant, that such acceptance could be made but in one of two ways; either (1) by payment or legal tender of the money

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agreed to be paid; or (2) by an acceptance in *writing*; and further, that such acceptance could not be made after the twenty-ninth day of February, 1864.

Neither of these insistments, respecting the character of the acceptance required, or the limit of the time fixed by the agreement for making it, is correct. Houghwout had "until the first day of March, 1864, to accept of the proposition." The construction put upon this language by the defendant himself, was that *it included the last named day*.

He was at Morristown the preceding day, had a conveyance prepared by his attorney from himself to Houghwout, executed and acknowledged it, and took it home with him to Madison, ready for delivery *on the next day* (which was the first of March), in case it should be called for by Houghwout. The meaning, then, given by Boisaubin to the words "until the first of March," was, I think, the natural and proper one. It is supported also by authorities. 16 *Barb.* 347; 3 *Dowl. P. C.* 535.

As to the character or nature of the acceptance by Houghwout, requisite to convert this proposal into a contract capable of being specifically enforced in equity:

If the proposal be clear and definite, and one to which a simple assent is a complete answer, such assent may be given either by *writing*, by *acts*, or by *words*. The statute of frauds requires the writing to be signed only by the person to be charged. *Fry on Spec. Perf.*, § 181-2-3; *Sug. on Ven.*, § 3, *ch.* 3, ¶ 2, 3, 8, 11, 12, 28, 30, 38.

It is true that mutuality is an essential quality of a contract to be specifically enforced. It is the familiar doctrine, that whenever the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other. But a class of cases exists, which are called conditional contracts, in which the quality of mutuality, if not wanting, is somewhat apparently modified; as, where a lessor covenants to renew upon the request of his lessee, or where the agreement is in the nature of an undertaking: when the condition has been made absolute by a

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request to renew, or by an assent to, or an acceptance of, the undertaking, they would seem to be mutual, and capable of enforcement by either party alike. *Fry on Spec. Perf.*, § 291.

If, therefore, the complainant, on or before the first day of March, gave his assent to, or in other words his acceptance of, the proposal of Boisaubin, (which it is not denied remained until that time a continuing and unrevoked offer,) either in writing, or by words, or by tender or payment of the price to be paid, he was entitled to receive from the defendant a conveyance of the lot.

It was necessary that the acceptance should be made on or before the first day of March. After such acceptance, each party to the contract had a reasonable time in which to perform it; Boisaubin to prepare and deliver his deed; Houghwout to pay the consideration. Neither party had a right to insist that the fulfillment or performance of the contract should be made on the last day named in the agreement. It is important, I think, to observe this distinction, because it does not seem to have been sufficiently noted at the time, and occasioned misconceptions as to the obligations and rights of both of the parties concerned.

In January, 1864, the complainant left New York for New Orleans, and did not return till April. Before leaving, he instructed his attorney, Solomon L. Hull, who had acted as such attorney for him in the purchase of the seventy acres, to carry out the purchase of the Spencer woods, and obtain from Mr. Boisaubin a deed for the same during his absence, if that should continue beyond the limited time. While in New Orleans he wrote to his firm in New York, directing the funds to be furnished to Hull, and sending to him his instructions to complete the purchase. Afterwards, and probably a few days before the end of February, Mr. Boisaubin called upon Hull, at his office in New York. As to what passed between them in that interview, the statements of Hull, who was sworn as a witness, are contradicted by the answer of Boisaubin.

Hull says: "He (Boisaubin) inquired if Mr. Houghwout

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was going to take the Spencer woods. I told him he was. He wanted to know when he would take the deed and pay the money. I told him about the first of March, the time called for in the contract. He said that was like Mr. Houghwout's meanness, to cheat him out of the interest by not taking the deed before. I asked him if he would bring the deed on the first of March to my office in New York, and receive the money. He said, no; he would execute the deed, and leave the whole matter with Mr. Dalrimple to settle with me. I told him that Mr. Houghwout said that the deed was to be taken subject to the mortgage then on the Spencer woods, and he replied that that was the understanding."

Mr. Boisaubin, in his answer, admits that he saw Mr. Hull in New York at the time spoken of by Hull, but denies that anything was said between them in regard to the purchase of the Spencer woods. He does not state what was his object in going to Hull's so near to the time when the acceptance was to be made, if at all; nor what was the subject of their conversation; nor was he sworn as a witness in the cause to deny or explain what had been testified to by Hull. He denies that there was an agreement or understanding between Houghwout, or Hull, and himself, that the deed was to be given for the property, subject to the Brittin mortgage then existing thereon for the principal sum of \$3254. But it appears that on the twenty-ninth of the month, he went to Morristown and obtained from Mr. Dalrimple a deed made in this way, and that he took it with him to Madison to deliver if required, the next day; and by the letter of Mr. Dalrimple, written to him the same day, at Madison, after his return, it appears that he was undecided, and considering whether he should go or not, the next day, to New York. These circumstances are consistent with the statements of Hull as to the interview in New York, and tend, I think, strongly to corroborate them. The contradiction or discrepancy between them as to what occurred at this interview, may be explained by attributing the negative statements of Boisaubin, in his answer, to his failure to recall, at that time,

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what had been said; an explanation so much more probable in itself, and consistent with the admitted facts in the case, that I cannot much doubt that the statements of Hull are substantially true. If true, a sufficient and valid acceptance was then made of Boisaubin's offer.

On the twenty-ninth of February, Hull sent his partner, Mr. Arnold, to Madison, to get the deed from Boisaubin, and settle with him for the price to be paid. Arnold, on arriving at Madison, found Boisaubin had gone to Morristown, and after some conversation with his brother, went to Morristown, to the office of Mr. Dalrimple. Before leaving Boisaubin's house, at Madison, some conversation was had between his brother and Arnold, as to the particulars of which they do not fully agree in their testimony as witnesses. They agree that Arnold stated that Houghwout had accepted Boisaubin's offer for the Spencer woods, and that he had come from New York prepared to settle the business; that one of them suggested that Boisaubin had gone to the office of Mr. Dalrimple in reference to the business, and that he might be expecting to go the next day to New York. However the discrepancies in their statements may be explained, it is apparent from the statement of each, that Boisaubin himself had talked of going the next day to New York, and is an additional circumstance to show, incidentally and strongly, that Hull's testimony as to the interview at his office a few days before, is to be taken as true.

Before Arnold got to the office of Mr. Dalrimple, Boisaubin had started on his way back to Madison. The letter to him from Mr. Dalrimple, written and received that day after his return, together with the statements to him by his brother, showed him that Houghwout's attorneys were prepared, and anxious on his behalf to consummate the purchase. They show that Boisaubin was anxious to avoid it. The messages communicated that day, both from his attorney and his brother, respecting the declarations and acts of the attorney of Houghwout in his efforts to consummate the purchase, amount, I think, in substance and effect, to a new and suffi-

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cient declaration from Houghwout that he had accepted Boisaubin's offer.

On the next day Boisaubin was at home with the conveyance ready for delivery, and Houghwout's attorneys were expecting him at their office in New York. In the afternoon of that day, as Mr. Boisaubin did not appear, the letter was mailed to him from the attorneys, of which a copy is given in the answer of Boisaubin, and in the affidavit of Arnold appended to the bill. This letter may be fairly regarded as another, and a written acceptance by Houghwout of Boisaubin's offer. It implies that a previous acceptance had been made; that they had been waiting and expecting that day to close the business of the purchase; and requests him to name a day convenient to himself when it might be done. This letter furnished to Boisaubin undeniable evidence that they considered the agreement for the sale mutual and complete, and that it remained only to carry the agreement or contract into execution. "The contract is perfected by the posting of a letter declaring the acceptance, because thereby the acceptor has done all that is requisite on his part, and is not answerable for the casualties of the post-office. Hence it follows that the contract dates from the posting, and not from the receipt of the letter of acceptance. In case of there being an agent for the proposer, the communication of the acceptance to him completes the contract, though the agent may fail to make known the acceptance to his principal." *Fry on Spec. Perf.*, § 185; *Vassar v. Camp*, 1 *Kernan* 441; *Mactier v. Frith*, 6 *Wend.* 103.

After the first day of March it was competent for either party to claim from the other, performance of the contract, completed by acceptance on the one side, of the proposal on the other. Each had a reasonable time for such performance. Boisaubin, however, notified the attorneys of Houghwout that *he would not deliver the deed*. He did so in two different ways within a few days from the first day of March; once through the letter of Mr. Williamson, and once by his distinct declarations to that effect to Arnold, in Madison. After

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these distinct and unqualified refusals, no further demands or tender were requisite on the behalf of the complainant. His right to seek a specific performance in equity was then, I think, complete.

Did he lose it by delay or by waiver?

I am of opinion he did not. In view of Houghwout's instructions to his attorneys on his return from New Orleans, of the notice given by them to the defendant that the claim would be sued, of the sickness of Hull, and the consequent delay in preparing the bill of complaint, the time that elapsed before the filing of the bill ought not to be taken as proof that Houghwout had abandoned or was sleeping on his rights. From the nature of the case, no definite rule can be given fixing the time within which a suit to enforce such rights should be brought. While equity requires the party who would enforce them to be vigilant and prompt, it does not discourage purposes of settlement, or reasonable delays for that purpose and the avoidance of unnecessary suits.

Upon the facts and the law of this case, I am of opinion that the complainant is entitled to a decree for specific performance. As it appears that some portions of the land have been alienated or encumbered by the defendant, I would advise, together with a decree for specific performance (if complainant elects to accept a conveyance for such interest or estate as Boisaubin may own), a rule of reference, to settle the amount and value of such interest, and what may be due on the existing encumbrances or liens.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY *vs.*
HETFIELD and others.

1. A bill seeking equitable relief must be dismissed when its allegations are denied by the answer, and unsupported by the proofs.

2. The mere filing in the office of the Secretary of State, of the survey of a railroad, is no notice to parties purchasing lands included in the survey. Such filing gives the railroad company neither title nor possession.

The Central Railroad Company v. Hetfield.

This cause was argued on final hearing, upon the pleadings and proofs, before Amzi Dodd, esq., one of the masters of the court.

Mr. F. T. Frelinghuysen, for complainants.

Mr. C. Parker, for defendants.

THE MASTER.

The bill in this case was filed to restrain the defendants from prosecuting two several actions of trespass in the Union circuit. One of these actions was against the railroad company by Hetfield alone, and the other by him and his co-defendants together. In 1851, Hetfield purchased two lots of land, numbered eight and nine, on the southeasterly side of Third street, in Plainfield. Shortly after his purchase, he conveyed an interest in a certain part of the lots to Coddington and Herbert. The railroad company, having laid its track on the southeasterly side of Third street, being the side between the centre line of the street, and the front of the lots eight and nine, the defendants sued in trespass, for the occupation of the street in front of their lots. Before the two actions were commenced, which the bill seeks to restrain, two similar actions were brought, in 1857, by the same plaintiffs, against the company for similar trespasses committed prior to that time. These were prosecuted to judgment against the company, and the judgments paid. Afterwards, the two actions now pending were instituted, and were noticed for trial, when an injunction was issued according to the prayer of the bill.

The suit is now brought to final hearing, upon bill, answer, and proofs.

The bill alleges that, in 1836, one Jacob A. Wood owned the lots eight and nine, and that the railroad company were then induced by him to lay their track through Third street, in which these lots were situated, instead of through First street, where the company first located, and were about to lay it; that Wood owned lots also in First street, which he

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thought would be injured if the railroad should be located there, and accordingly induced the company to change the original location, (although it was straighter and better for them than the one through Third street,) agreeing to give the company a deed for his land, occupied by the street, in consideration of the change; that the company, in pursuance of such agreement, made the change and built their road at that time, on each side of the centre line of Third street, and have ever since kept it there; that Wood received a full consideration for the lands so taken, being part of the southeasterly half of the street in front of the above lots, but that if he ever gave any written grant or conveyance of the land, it has been lost or destroyed; that the company spent large sums of money in building their road; that they laid it through Third street, partly on the southeasterly side of the street, with the knowledge and consent, and by the request of Wood; that the present owners, the plaintiffs in the actions of trespass, derived their title from Wood's grantees, with full knowledge of the company's road being there, and of their right to have it there.

The bill prays that the defendants, the present owners, may be compelled to a specific performance of the agreement made by Wood, and be decreed to execute to the company a grant of the right of way over that part of the street; or that the complainants may be decreed to be entitled to the peaceable enjoyment of the right of way, on making such compensation therefor as may be ascertained to be just, on a reference to a master, or on an issue in the Supreme Court, and that the prosecution of the trespass suits be meanwhile restrained.

The allegations of the bill are not sustained by the proofs. On the contrary, it appears that the company's road was laid in 1836, on the northwesterly side of the centre line of Third street, and not on the premises in question in this suit. When the present owners, the defendants, purchased the lots eight and nine, no track had been laid on their side of the street, and none was laid there till 1853 and 1855. It appears

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from the proofs, that Wood also owned a house and lot on the northwesterly side of Third street, nearly opposite to the lots eight and nine, and that in front of this house and lot, and on that side of the street, the track was laid. The present owners had no notice, therefore, of any rights of the company in the other side of the street, arising from the company's possession of it. They deny that they ever knew or heard of the agreement alleged to have been made by Wood, and aver in their answer that when they purchased lots eight and nine from Wood's grantees, they had no knowledge or notice that the company claimed any right to use that side of the street. There is nothing in the proofs to rebut this allegation of the answer. It is true that the survey filed by the company in the office of the Secretary of State, makes the centre line of Third street the centre line of their road. But their road was not built in conformity to the survey, and their possession was only of one side, and not of both. The mere filing of the survey gave the company neither title nor possession, and was no notice to the present owners at their purchase, of the rights now claimed on both sides of the centre line.

If Wood made the agreement in 1836, as set out in the bill, the company did not act upon it till 1853 or 1855, except as to the other lands owned by Wood on the opposite side of the street. As to the premises in question, nearly twenty years elapsed before any actual possession was attempted to be taken. I am unable to discover any ground upon which the present owners can be decreed to execute to the company the conveyance prayed for in the bill.

Neither can I find any facts in the case by which they are equitably estopped from denying the company's right to that side of the street. They do not appear to have acquiesced in, or to have consented to, the building of the track, or to have received any consideration or compensation for the lands taken by the company in building it. So far as appears, the company assumed the right to take that side of the street, and the defendants resisted the assumption, by suing them

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in trespass. The suits were brought in a reasonable time, and I am unable to see why the company should not be left to make out their legal title, or why they are entitled to the aid of this court.

No difficulty exists, and none is alleged to exist, preventing the company from acquiring title to the premises in the way provided by their charter. The value of the land and the damages can in this way be ascertained quite as readily and justly as by a reference to a master, or the making up of an issue in the Supreme Court. The propriety of either of the two latter methods may well be doubted.

I would respectfully advise a decree dismissing the bill with costs.

RICHARDS vs. CLARK'S EXECUTORS.

M. C., by the residuary clause of her will, gave a certain bond and mortgage, and certain shares of stock, to her daughter E. and her son J., to be divided between them, share and share alike. E. afterwards married and made a will, leaving all her property, real and personal, to her husband. The husband filed a bill against the executors of M. C., and her son J., for the payment to him of one half of the principal of the bond, and of the shares of stock, as well as of the interest and dividends, respectively accrued thereon, since the death of E. The defendants dispute the claim, and insist that J. is entitled to the whole thereof, as next of kin.

Held, that E. was entitled to one half of the principal of the mortgage, and of the shares of stock, upon the death of M. C. She could dispose of her interest in them by will; or if she had died intestate, it would belong to her husband, under the statute of distributions. Complainant entitled to the funds.

The bill in this cause was filed on the sixteenth day of May, 1867, by Seaman P. Richards, executor of his wife, Eliza Y. Richards, late of the city of Elizabeth, in this state, deceased. It sets forth that in 1862, at said city, Margaret H. Clark, a widow, and mother of the said Eliza, departed this life, having first duly made and published her last will and

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testament, which was duly proved before the surrogate of the county of Union.

The bill alleges that in and by her said will, the said Margaret H. Clark did give and bequeath unto her daughter, the said Eliza Y. Richards, besides various specific articles, the interest upon a bond and mortgage executed by one Tichenor, for \$6000, and also, the dividends declared upon her (the said Margaret's) shares of the capital stock of the State Bank at Elizabeth; that she directed her executors, if it should be necessary for said Eliza's support or comfort, to pay to her so much of the principal of said bond and mortgage as should be necessary therefor, or to sell the said stock and pay the proceeds to her; and after certain other gifts and directions, she did give and bequeath all the rest and residue of her estate, both real and personal, to her son, James H. Clark, and her daughter, the said Eliza Y. Richards (then Clark), to be divided share and share alike, to them, their heirs and assigns for ever; and appointed Elias Darby, and John D. Pierson, jun., the executors of the said will.

It alleges that the said Eliza Y. Clark was afterwards married to the complainant, and subsequently thereto departed this life, having first duly made and published her last will and testament; and that therein and thereby she did give and bequeath to the complainant all her estate, both real and personal, to him and his heirs for ever, and did appoint him one of the executors of said will; and that he duly proved the same.

It further alleges that one child was born to him by the said Eliza, who died in infancy, and before the said Eliza; and that said Eliza and James H. Clark were the only children of the said Margaret H. Clark.

The bill charges that no part of the principal of said mortgage was paid to or for the support of the said Eliza, nor was any part of said bank stock sold in her lifetime; but that said mortgage and bank stock still remain in the hands of the executors of the said Margaret. It alleges that the complainant is entitled, as executor of the said Eliza, to the

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one half part of the principal of said mortgage, and of the interest thereon since her death, and all the interest accrued thereon and unpaid to her at her death; and to one half of said bank stock, and of all dividends thereon since said Eliza's death, and all of the dividends accrued thereon and unpaid to her at the time of her death; and that the executors have refused to pay over such interest and dividends as have accrued since said Eliza's death, under doubt as to whether, under said wills, the said complainant is entitled to the same.

The bill prays that the said executors may be decreed to pay over and transfer to the complainant, the one half part of said bank stock, and of the interest and dividends accrued on said mortgage and stock respectively, since said Eliza's death.

The defendants, by their answer, admit the general allegations of the bill; but deny that the complainant, as executor of the said Eliza, is entitled to one half part of the principal of said mortgage, or to the interest which has accrued thereon since the death of the said Eliza, or to one half of the said bank stock, or to the dividends declared thereon since the death of the said Eliza. They allege that the contingency never happened upon which the said executors were to pay to the said Eliza any part of the principal of said mortgage, or of the stock; that she never requested, or desired them to pay anything more than the interest and dividends. They aver that upon the death of the said Eliza, the defendant, James H. Clarke, as next of kin of the testatrix, Margaret H. Clark, his mother, became and is now entitled to said bond, mortgage, and bank stock, and to the interest and dividends accruing thereon since the death of the said Eliza.

The cause was heard upon bill and answer.

Mr. Runyon and Mr. Guild, for complainant.

Mr. R. S. Green, for defendants.

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THE CHANCELLOR.

The Tichenor mortgage, and State Bank shares, belonging to the testatrix, Margaret H. Clark, were not bequeathed or disposed of by any specific bequest in her will. They were, therefore, part of the rest and residue of her estate given equally to her two children; and one half of them belonged to her daughter Eliza, at the death of Eliza, and she could dispose of it by will.

Had Margaret H. Clark died intestate as to the principal of that mortgage and those bank shares, the right to them would, at her death, have vested in her two children, equally, as next of kin. Eliza could dispose of her interest in them by will; or if she had died intestate, they would belong to her husband under the statute of distributions. In either case, the complainant is entitled to these two funds.*

BARON GEVERS AND WIFE *vs.* WRIGHT'S EXECUTORS
and others.

1. If, in a marriage settlement, the intended wife conveys all her property which she now has, or may hereafter acquire, to trustees, this will not of itself, at law, convey her after acquired property. It will be treated in equity as an agreement to convey, and enforced as such, if necessary to carry out the objects declared in the marriage settlement.

2. A provision for children in a voluntary settlement, made after marriage, is not a sufficient meritorious consideration to compel performance by the party himself making the settlement, but is, as against his representative. In an antenuptial settlement, made in consideration of marriage, a provision for children is upon meritorious consideration, and will be enforced.

3. An antenuptial settlement, which, upon its face and by its recitals, was intended to secure to the wife the absolute control over all her own property, including what might come to her after marriage, and which gave to her absolute power of disposition, either to her children or strangers, and gave the property to the children of the marriage, only on failure of disposition by her, will not be enforced in favor of the children by construing words of grant into a covenant to convey, and enforcing the conveyance. Such construction will only be made to fulfill the intention of the parties.

* Decree affirmed, 6 C. E. Gr. 361.

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Mr. C. Parker, for complainants.

Mr. Bradley, for defendants.

THE CHANCELLOR.

On the fifteenth day of November, 1855, the complainant Baron John Cornelius Gevers, was married to the complainant, Catharine Maria Gevers, then Catharine Maria Wright, at Newark, where her father, the Hon. William Wright, resided. On the day preceding the marriage, a marriage settlement under seal, was executed between Catharine Maria Wright, of the first part; Frederick J. Peet and Edward H. Wright, trustees, of the second part; and the Baron Gevers, of the third part. This recited the intended marriage, and that it had been agreed, that whatever property the said Catharine Maria then had, or thereafter might become entitled to, should be conveyed to trustees, and thereby secured to her separate use, beyond the control of the party of the third part, and not be subject to his debts. And in consideration thereof, and of one dollar, she, the said Catharine Maria, thereby assigned and conveyed to the said trustees, and the survivor of them, all the property, real and personal, which she then had, or might thereafter, during coverture, acquire or become entitled to, in trust, to hold the same until the marriage, for her use; after the marriage, during coverture, to pay the income to her for her separate use, upon her separate receipt, as if *sole*; and if she survived her husband, upon his death, to re-convey the same to her. But if her husband should survive her, then in trust for such persons as she might, by writing in the nature of a will, appoint, and if she should die without such appointment, then in trust for the issue of the marriage; and if she should die without appointment or issue, her husband surviving her, then in trust to pay to him the income of one half of said property, and to pay and distribute the other half, and also at the death of her husband the half so reserved, to her heirs and next of kin, as if she had remained *sole*. The Baron Gevers cove-

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nanted with the trustees that he would permit her to make her will; that he would not interfere with the trust property, and would do all acts proper or necessary to vest such property in the trustees. It was provided that the principal should not be changed or re-invested, without the written consent of Mrs. Gevers; that the principal should not be diminished by payment or appropriation; and that the income should not be disposed of by anticipation.

This instrument was left with the father of Mrs. Gevers until his death. She had not, at the time of the execution of the agreement, or of the marriage, any estate or property, nor did she become entitled to any until the death of her father, which occurred on the fourth day of November, 1866. He left a will, by which, after several special legacies, he gave the residue and bulk of his estate, which was large, to his wife and his two children, the complainant, Catharine Maria Gevers, and the defendant, Edward H. Wright, equally to be divided between them. And he directed that the portion given to his daughter should be for her sole and separate use, free from the control, debts, or obligations of her present or any future husband, with power to her to dispose of the same by deed, will, or otherwise, as she should think proper, and her sole receipt to be in all cases sufficient. Of this will he appointed his wife, Minerva Wright, his son, Edward H. Wright, and Joseph P. Bradley, esquire, executors.

An instrument revoking the marriage settlement was drawn, dated February first, 1867, and was duly executed by the complainants, but was not executed by the trustee, E. H. Wright, who is named therein as a party to it.

Upon application of the complainant, Mrs. Gevers, to pay over to her the share of her father's estate given to her by his will, the executors declined to do this, on the ground that, by the marriage settlement, the trustees are entitled to receive it, and hold it for the purposes of that settlement. And thereupon the complainants, the Baron Gevers and Mrs. Gevers, have filed their bill against the executors, and Edward H. Wright, as surviving trustee, the other trustee having

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died, and against William A. S. Gevers and Catharine Maria Gevers, two infant children of the marriage; and pray that it may be decreed that the share of the estate of William Wright, given in his will to the complainant, Mrs. Gevers, vested in her directly by the effect of the will for her sole and separate use; that the marriage settlement has not, and cannot have any effect upon the property given to her by the will; and that the executors shall account to her for it, and pay it over to her upon her separate receipt; and in case it is not so decreed, that a new trustee may be appointed in the place of the deceased trustee, to act as co-trustee with Edward H. Wright.

The complainant, Baron Gevers, is a subject of the King of the Netherlands, whom he represents as Minister Plenipotentiary to the Emperor of Russia, at St. Petersburg, where the complainants reside.

The defendants have all answered, admitting the facts and submitting to the judgment of the court. The estate is large, exceeding a million of dollars; and the trustee and executors, while they do not desire to interpose any obstacle to the relief sought by the complainants if it may be lawfully had, have very properly presented the case to the court fully and fairly, that its direction may be given according to the settled principles of equity.

It is clear that the deed of settlement did not convey the property in question. It could not, for the complainant herself had then no rights or property to convey. And the deed being, as to her, without covenants of any kind, it could not convey at law by estoppel.

But courts of equity will give effect to instruments by which property to be acquired at a future time is conveyed, or agreed to be conveyed. The instrument will be considered as an agreement to convey, and courts of equity, by virtue of the power of enforcing the actual performance of contracts, will compel the conveyance, or consider it as executed. This is well settled by many authorities. *Beckley v. Newland*, 2 P. W. 182; *Hobson v. Trevor*, *Ibid.* 191; *Curtis v. Auber*,

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Jac. & W. 506; *Langton v. Horton*, 1 *Hare* 549; *Douglass v. Russell*, 4 *Sim.* 524; *S. C.*, on appeal, 1 *Mylne & K.* 488; *Mitchell v. Winslow*, 2 *Story's R.* 630; *Smithurst v. Edmunds*, 1 *McCarter* 408; 2 *Story's Eq. Jur.*, § 1040.

But courts of equity will not aid and give validity to contracts or instruments which are of no effect at law, in favor of volunteers, but only when the contract or right sought to be enforced or established, is founded on a valuable or meritorious consideration. 2 *Story's Eq. Jur.*, §§ 987, 1040 c, 1040 d; *Atherley on Marriage Settlements* 145; *Vernon v. Vernon*, 2 *P. W.* 594; *Coleman v. Sarel*, 3 *Bro. Ch. Cas.* 12; *Meek v. Kettlewell*, 1 *Phil* 347.

Marriage is a valuable consideration; and a contract to make a settlement of property to be acquired, made before marriage, in consideration of it, will be enforced in equity. And in this case, if the application was by the trustees to compel Baron Gevers to execute conveyances of after acquired property to them for the purposes of the settlement, the court would give relief.

Whether the making a provision for a wife or child, on account of the duty of a husband or father to provide for wife and children, is such a meritorious consideration as contradistinguished from a valuable one, as will entitle to relief in equity to enforce a contract or settlement not valid at law, is a point upon which the courts have differed.

In *Ellis v. Nimmo, Lloyd & Gould* 333, decided by Sir Edward Sugden, while Chancellor of Ireland, it was held a sufficient consideration. Sir L. Shadwell, V. C., in *Holloway v. Headington*, 8 *Sim.* 324, held that it was not sufficient; and said that the ruling of Sir Edward Sugden had been overruled by his successor.

Lord Cottenham, in *Jefferys v. Jefferys*, 1 *Craig & P.* 138, held that it was not a sufficient consideration to uphold a voluntary settlement upon daughters. The English editors, in their notes to *Ellison v. Ellison*, 1 *White & Tudor's Lead. Cas.* 230, come to the conclusion that it is not a sufficient consideration. The American editors come to the contrary con-

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clusion. *Atherley*, in his treatise on *Marriage Settlements*, p. 131 to 148, shows that there is doubt upon the question, but comes to the conclusion that the provision for a wife or child is not a sufficient meritorious consideration to enforce a marriage settlement as against the settler himself, but is sufficient as against his heir or devisee.

In the case under consideration, the only rights to be considered are those of the issue of the marriage. The parties to the contract are the complainants and the trustees; the complainants waive their rights under it; the trustee, then, here represents only the issue, actual and prospective. And if this issue have rights under the contract that this court would enforce upon a bill filed by the trustee, the relief prayed for must be refused. The children themselves are mere volunteers, in whose favor no contract would be enforced, if making provision for a child is not a meritorious consideration, except an antenuptial marriage contract.

But if this was an actual contract by Mrs. Gevers with her husband, binding her to convey her future acquisitions to trustees for the use of the children of the marriage, then the children would be within the consideration of marriage, and the contract would be enforced for the benefit of the issue. And the real question in the case is, whether this instrument is to be treated as a contract by Mrs. Gevers to convey such property for the benefit of the issue of the marriage. The instrument does not, at law, convey her after acquired property, and it does not in fact agree to convey it. If it is not in fact such contract, it may be considered and treated as such in equity, if necessary to carry out the intent of the parties. But if no such contract was made by the parties, equity will not make it for them, unless for the purpose of carrying out their plain intent.

Now, the intention of this instrument was not to provide for the issue of the marriage, but to retain to Mrs. Gevers the complete control of her own property, present and future, free from the marital rights of her husband, and to enable her to dispose of it by will. The provisions of the contract

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clearly show that such was the intent; it secures no part of it to the issue, but gives her full power to bequeath to her husband or to a stranger; and besides, in the recital, it is expressly declared that the object of the agreement was to secure such control to her. Her husband is expressly bound to join in conveyances; he made a contract that can be enforced. If the instrument had intended to bind her to convey her after acquired property, whether she wanted to do it or not, it would have contained the same obligation on her part; this covenant on his part, would have suggested it. From the situation of the parties, the objects and provisions of the instrument, it is clear that it was intended only for the protection of Mrs. Gevers, and not to compel her to part with the control of property she might afterwards become entitled to, unless she judged it proper so to do.

I know of no case in which it has been held that a settlement by which the wife attempted to convey her property to be acquired, was a contract to convey such property to trustees for the purposes of the settlement. Such an implication is without authority.

The portion of Mrs. Gevers, given to her by the will of her father, is given to her sole and separate use, with full power of disposition. Her father, in whose custody the settlement remained and who must be supposed to have known its contents, chose to give her the control of her property, by the provisions inserted in his will, and not by devising it to the trustees in the marriage settlement, to be held under that. His intention will not be frustrated.

By a series of decisions in the Court of Chancery in England, it has been held that even where an antenuptial marriage settlement bound the husband, by express covenants, to convey to the trustees for the use of the settlement, and in trust for issue within the consideration of marriage, that he was not bound to convey property given after marriage, to his wife, to her own separate use; but he could hold such property by his marital right. *Douglas v. Congreve*, 1 *Keen*

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410; *Travers v. Travers*, 2 *Beav.* 179; *Drury v. Scott*, 4 *Young & Coll. Ex. R.* 264.

If these cases are considered as of authority here, the principle established by them would lead to the same conclusion.

I am of opinion that the marriage settlement is not a contract on the part of Mrs. Gevers to convey the property to which she has become entitled after her marriage, to the trustees for the uses of the settlement; but that she is at perfect liberty to receive it herself, and retain it under her own control, or to transfer it to the trustees to be held for the uses of the settlement; and that the executors of William Wright are bound to account to her for her share of his estate, and to pay it over to her on her own separate receipt.

The marriage settlement is not and cannot be revoked by the parties to it. Mrs. Gevers has not the capacity to revoke it. It must be kept alive, that she may, if she elects so to do, transfer any part of her property to the trustee to hold subject to its trusts. Therefore, in this suit, a new trustee may be appointed if she desires it.

BREWER vs. MARSHALL and CHEESEMAN.*

1. A covenant made by the grantor in, or at the time of, the conveyance of land, relating to the land, runs with the land, and enures to the benefit of any subsequent purchaser from the grantee or covenantee.

2. A covenant made by the owner of land with a stranger to the land to which it relates, will not run with the land when conveyed away by the covenantor, so as to be a burthen upon it, although the deed containing the covenant may convey other land which the covenant was intended to benefit.

3. A covenant will not run with land so as to be a burthen upon it in the hands of the purchaser, unless there be some privity of estate between him and the covenantee.

4. A covenant may amount to a grant, and thus create an easement and impose a servitude upon the land of the covenantor; in which case the

* CITED in *Grigg v. Landis*, 6 *C. E. Gr.* 502; *Bank v. Segur*, 10 *Vr.* 184.

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land will be liable in the hands of every subsequent purchaser, to the burthen of such servitude.

5. A covenant not to sell marl from a certain tract of land, or not to carry on any specific business upon it, does not create an easement, or impose a servitude; it is only a personal covenant.

Mr. J. Wilson, in support of the motion to dissolve.

Mr. Browning, contra.

THE CHANCELLOR.

The injunction in this case restrains the defendant, Marshall, from selling or removing from the farm conveyed to him by the defendant, Cheeseman, known as the Swope farm, any marl, and from digging any marl on it except for the use of the farm. The defendants have filed their answer, and move to dissolve the injunction.

The defendant, Cheeseman, was, in 1841, seized of a farm in the county of Gloucester, known as the Swope farm, on which there were valuable beds of marl. On the twenty-third of February, in that year, he conveyed to James W. Lamb, two tracts of that farm, one a tract of forty-eight acres, lying east of the Cross Keys road, which divided the farm, and another of twelve and a half acres, lying west of the road, on Great Timber creek, and which, in the deed, is described as "twelve acres and a half of marl land." The deed grants a right of way over a strip twenty feet in width, from the road to the creek, along the marl lot, and contains in the description of the premises, after the description of the way, these words: "Also, the said George Cheeseman, his heirs or assigns, are not to sell any marl by the rood or quantity from off his premises adjoining the above property."

On the fourteenth of December, in the same year, Lamb conveyed back to Cheeseman the forty-eight acre lot. On the third of January, 1842, Cheeseman conveyed to Lamb another part of the Swope farm in two lots. One was a lot

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of seven acres adjoining the creek, and north of and adjoining the twelve and a half acre lot; the other was a strip of one acre, leading from the seven acre lot eastwardly to the road, and including the land over which the right of way had before been granted. On the same day, Cheeseman executed to Lamb a bond in the penalty of \$5000, secured by a mortgage on part of the Swope farm not conveyed. The conditions of the bond and mortgage (which were both in the same words) contained this recital: that Cheeseman, in consideration of \$1650, had, by deed of the same date, conveyed to Lamb a lot of seven acres, part of the Swope farm; that the principal value of said lot consisted in the valuable beds of marl upon it; that there were divers like beds of marl upon the residue of the Swope farm; that said sum was paid not only as the consideration for said lot, but upon the express agreement between the parties, that neither Cheeseman, his heirs or assigns, nor any other person holding said farm, should, within thirty years from the date, dig, sell, remove, or suffer to be dug, sold, or removed, from off the said farm, any part or parcel of the marl thereon, except for the use of the farm, "so that the said marl, or any part thereof, should not be sold or otherwise brought into competition with the marl of the said James W. Lamb;" and upon the further agreement that for any violation of said covenant, by the said Cheeseman, his heirs, executors, administrators, or assigns, or other persons holding said farm under him or them, said Cheeseman, his heirs, executors, or administrators, should pay to said Lamb, his heirs, executors, administrators, or assigns, the sum of \$500. The condition was that if they did not so dig or sell, and if they paid up such penalties, the obligation and mortgage should be void.

On the sixth of September, 1842, Lamb conveyed back to Cheeseman the seven acre lot, except a triangular part containing about one-tenth of an acre, retained to give access from the one acre strip (used as a way) to the twelve and a half acre lot; this being the means of communication from that lot to the Cross Keys road.

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Lamb conveyed the twelve and a half acre lot, the one acre used for a way, and the tenth of an acre reserved from the seven acre lot, to the complainant, Brewer, by two deeds, one dated March third, 1847, the other dated January third, 1848; the last deed conveyed the one acre used as a road, and the tenth of an acre reserved from the seven acre lot. And on the same day, Lamb assigned to Brewer the bond and mortgage given to him by Cheeseman.

Cheeseman, by four deeds made at different times, conveyed to the defendant, Marshall, the rest of the Swope farm not conveyed to Brewer.

Both defendants have, at different times, dug, removed, and sold, from the seven acre tract and other parts of the Swope farm, marl by the ton and measured quantity, since 1842; and the defendant, Marshall, was continuing to do so, until the injunction.

These facts appear by the bill, and are admitted by the answer.

The complainant insists, that the clause in the deed of 1841, and the agreement recited in the bond and mortgage from Cheeseman to Lamb, are real covenants running with the land; that he, as the assignee of Lamb, and the owner of the lands conveyed to him, is entitled to the benefit of these covenants; and that Marshall, as the assignee of the land to which they relate, held by Cheeseman at the making of them, holds that land subject to the burthen of these covenants, and is bound to observe them.

Upon the correctness of these positions, the whole question of the injunction depends. If the covenants do not run with the land conveyed to Brewer, he, as assignee, cannot have the advantage of them; and if the burthen of them does not run with the land conveyed to Marshall, he is not bound by them. In either case, the injunction against Marshall ought not to be retained.

There has been much discussion in the courts, as to what covenants or agreements are real covenants, and run with the land, so that the assignee or heir of the land can take ad-

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vantage of them, and as to what covenants run with the land burthened by them, so that the assignee or heir takes the land subject to the burthen.

Both of the covenants in this case are valid as personal covenants; Lamb could maintain a suit against Cheeseman for their violation, and could recover his damages. For the purpose of this motion, we may admit that the mortgage is valid as against Marshall; he took title subject to it, and his lands are liable, in case of forfeiture or breach of condition. But the injunction does not depend upon that question; for such damage Brewer, as assignee, must look to a foreclosure and sale. The injunction can only be maintained on the ground that the agreement in the recital is a covenant real, running with the land.

The leading case on this subject is Spencer's case, reported in 5 Rep. 16, and printed and commented on in 1 *Smith's Lead. Cas.* 115. There Spencer demised a house and lot to S. for years. S. covenanted for himself, his executors, and administrators, that he, his executors, administrators, or assigns, would build a brick wall on part of the land demised. S. assigned the term to J., and J. to Clark. Spencer sued Clark for a breach of the covenant to build the wall. The court, by the first resolve, held, that a covenant only bound the assignee when it was concerning a thing *in esse*, parcel of the demise, not when it related to a wall to be built. By the second resolve, they held, that if the covenant had bound *the assigns* by express words, it would have bound the assignee, although it was for a thing to be newly made; as it was to be upon the thing demised; but that if the covenant was for a thing to be done collateral to the land, and did not touch or concern the thing demised, in any sort, as if it were to build a house upon other lands of the lessor, the assignee should not be charged, although the covenant was for the covenantor and *his assigns*. ✓

The two principles thus settled, have always been acknowledged as law: that the assignee when not named, is not bound by a covenant, except it relates to a thing *in esse* at

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the time; and that when named, he is not bound by a covenant collateral to the land, but only for things to be done on, or concerning the land.

The case of the *Mayor of Congleton v. Pattison*, 10 East 130, confirms these positions. In that case, the plaintiffs demised to Clayton, mills in Congleton; he covenanted for himself *and assigns*, to hire no one to work in the mills but inhabitants of Congleton. Clayton assigned to Pattison, who was sued on the covenant. Although the thing to be done was on the premises demised, yet as it did not affect the use of them, but only the value of other lands of the lessors in Congleton by relieving them of an increase of poor rates, the court held the assignee was not bound. To the same effect is *Keppell v. Bailey*, 2 Mylne & K. 517; *Hurd v. Curtis*, 19 Pick. 459, and many other cases that will be found in the notes to Spencer's case, in Smith's Leading Cases. In this case the covenant, though not to be performed *on* the twelve acre lot, is yet alleged to be *touching or concerning it*, and therefore may be held to pass to the assignee of that lot. It is true that selling marl from the rest of the Swope farm would not affect the twelve acre lot, or its use or enjoyment, but it might affect the market value of the marl dug from it.

The application of the rule in Spencer's case, naturally divides itself into two classes of cases; one, when the premises conveyed or demised, are sold or assigned by the covenantor, and the question is whether the covenant passes to such assignee, as running with the land; the other, when the covenantor sells or assigns his interest in the lands, and the question is whether the burthen of the covenants is impressed upon the land, and passes with it and binds the assignee of the covenantor. And although in this case it may be held that the covenant of Cheeseman runs with the land sold to Lamb, and passed to Brewer so that he is entitled to sue Cheeseman for a breach, yet it is a very different question, whether the burthen of it is impressed upon the land retained and sold to Marshall, and the obligation of it assumed by him, on the purchase of the land from Cheeseman.

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The result of their review of the authorities and cases on this point, is stated by the English and American editors of Smith's Leading Cases, in their notes on Spencer's case, and I think, gives correctly the law upon it. The English editor says, on page 123, vol. 1: "By the common law, except in the case of landlord and tenant, the burthen of covenants does not run with the lands, though the benefit does;" and again on page 125: "With respect to covenants entered into by the owners of the land, great doubt exists whether these, in any case, run with the land so as to bind the assignees of the covenantor;" and on page 133: "Upon the whole there appears to be no authority for saying that the burthen of a covenant will run with land in any case, except that of landlord and tenant." The American editors say, on page 144: "On the whole, therefore, we may infer that the burthen of covenants charging land, made by the owner with an entire stranger to the land so charged, will not run with the land at law, nor rest upon the parties taking it by assignment, even where the covenantee takes, by virtue of the deed containing the covenant, an estate in other and distinct land belonging to the covenantor."

This rule does not apply to the liability of the assignee of a term to pay the rent reserved. Rent, by its definition, issues out of the land, and it is made a charge upon it by the lease, without any covenant to pay it, and does not depend upon the covenant. But it has been held to apply to an after made covenant to pay the rent *free from taxes*. In *Brewster v. Kidgel*, 12 Mod. 166, Lord Holt said if it was a *grant* of the rent, it would be another matter, but it is here only a covenant, and no words amounting to a grant, and therefore there could be no relief against the terre-tenant. The other judges held that the covenant, being in the nature of a grant, might charge the land, and decided the cause on that ground.

To charge land with the burthen of a covenant there must be some privity of estate between the covenantee and the assignee of the lands so burthened, or he will not be charged with the covenant. This was so laid down by the court in

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delivering their opinion in *Bally v. Wells*, 3 *Wilson* 29: "There must be always a privity between the plaintiff and defendant to make the defendant liable to an article of covenant." The reasoning of Lord Brougham, in *Keppell v. Bailey*, in 2 *Mylne & K.* 517, is founded upon, and illustrates this principle. The decision of the Supreme Court of Massachusetts, in *Hurd v. Curtis*, 19 *Pick.* 462, is expressly placed upon the ground that there is no privity of estate between the plaintiff and defendant. The covenant was between the owners of mills on the same stream, as to the use of the water in their respective mills; it was drawn to bind their assigns. The defendant was assignee of the mill of one of the covenantors. It was held that he was not bound, as there was no privity of estate between him and plaintiff. See also *Plymouth v. Carver*, 16 *Pick.* 183.

In the case before me, it is clear that there is no privity of contract, or of estate, between Brewer and Marshall. And if such privity is necessary to that object, Marshall is not bound by the covenant.

The authorities that seem to hold a different doctrine, are chiefly those in which the agreements or covenants, made by the person then owning the land burthened, are of such a nature that they may be held to impress on the land burthened, a servitude or easement in favor of some other property of the covenantee.

Such was the case of *Tulk v. Moxhay*, 2 *Phil.* 774, decided by Lord Cottenham, and the cases of *Whatman v. Gibson*, 9 *Sim.* 196, and *Schreiber v. Creed*, 10 *Sim.* 35, decided by Vice Chancellor Shadwell. It was in those cases stated, that the question was not, whether the covenants run with the land, but whether there was not "an equity attached to the property." The remarks of Chancellor Williamson, in *Woodruff v. The Water Power Company*, 2 *Stockt.* 505, are based upon this principle. He says: "The grantor reserved to himself a right of way on the main raceway, and also a convenient landing place on the river. The right of way, as well as the landing place, was an interest in the thing granted.

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and would pass as *appurtenant* to the grantor's farm. In the case of *Hills v. Miller*, 3 *Paige* 254, of *Watertown v. Cowen*, 4 *Paige* 510, and of *Barrow v. Richard*, 8 *Paige* 350, the covenant or agreement created an easement, either by reservation in the land granted, or by grant in other lands of the grantor. The right to light and air, without obstruction from buildings on the adjoining lands, is a well known species of easement, and the right to enjoy the pure air without being laden with odors or dust, or disturbed by disagreeable sounds, is of the like nature. They are easements that may be attached to one parcel of land, and the burthen of not erecting anything that would disturb such enjoyment, is a servitude that may be impressed upon another. But the exclusive right of carrying on a trade upon one lot is not an easement; and although a covenant not to carry on such trade upon his adjoining property may bind the covenantor, he cannot make it a servitude upon that property, so as to burthen it in the hands of purchasers.

The conclusion is, that neither the covenant nor agreement in the deed of February twenty-third, 1841, or in the recitals in the bond and mortgage of January third, 1842, are covenants that run with the land conveyed to Marshall; nor can they be considered as grants of an easement or servitude upon it, in favor of the land sold to Lamb and held by Brewer.

No opinion is intended to be given on the questions of an action at law against Cheeseman by Brewer, or of the validity of the mortgage in the hands of Brewer. The motion to dissolve the injunction has nothing to do with either.

I am of opinion that the injunction should be dissolved.*

* Decree affirmed, 4 *C. E. Gr.* 537.

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OBERLY and others vs. LERCH and others.*

1. The surplus of the proceeds of lands of a decedent, sold by order of the Orphans Court for the payment of his debts, above the amount needed for the payment of debts, retains the character of real estate, and upon the death of the person entitled thereto, will pass by succession, as real estate. So also will the proceeds of lands sold by order of a court on proceedings for partition, because incapable of partition.

2. Such proceeds retain their character of real estate for the purposes of succession until they vest in some person who is not an infant or lunatic, and who has capacity to change the nature of the estate, and who by accepting it as money, or by some act recognizing it as personal estate, gives it the character of personalty.

3. The income from lands, and the interest on the proceeds of the sale of lands, are personal estate, and will, upon the death of an infant to whom they belong, be transmitted as such, while the lands, and the proceeds of their sale, pass as real estate.

4. When lands of an infant in another state are sold by partition proceedings there, if by the law of that state the proceeds are to be considered personal estate, and to be transmitted as such, they will pass as such in this state, although they are, at the death of the infant, in the hands of the guardian appointed in this state, and the infant is a resident of this state.

This cause was argued on a motion to dissolve the injunction, and to dismiss the bill.

Mr. Shipman and *Mr. Vanatta*, in support of the motion.

Mr. E. T. Green and *Mr. J. Wilson*, contra.

THE CHANCELLOR.

Owen Oberly, of Warren county, died on the first day of September, 1852, intestate, seized of a valuable farm in that county, leaving a widow, the defendant, Anna Maria Lerch, who afterwards was married to the defendant, Benjamin F. Lerch, and one child, Emma Oberly, an infant three weeks old. His personal estate was not sufficient to pay his debts. Administration of his estate had been granted to his widow,

* CITED in *Wurts' Ex'rs v. Page*, 4 C. E. Gr. 375; *Cook's Ex'r v. Cook's Adm'r*, 5 C. E. Gr. 377.

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and upon application by her and the defendant, Benjamin F. Lerch, who after the intermarriage had been joined with her in the administration, the Orphans Court of Warren county, in April, 1853, made an order for the sale of the farm to pay debts of the intestate to the amount of \$3818.87. On the fourth of September, in that year, the farm was sold for \$12,876.49, including the widow's right of dower. Of this sum, one third was invested on mortgage for the life of the defendant, Anna Maria; and of the residue, there remained on the settlement of the final account, on the sixth of April, 1859, \$5794.41 above debts and expenses. This balance was paid unto Charles Oberly, one of the complainants, who had been duly appointed guardian of the infant, Emma Oberly.

In 1861, Charles Oberly, as such guardian, received \$389.59, the infant's share of that part of the proceeds of the lands of her paternal grandfather, John Oberly, situate in the county of Warren, sold in 1834 by a partition sale, which had been invested for the dower of her grandmother, Catharine Oberly, who died in 1860; and also, \$1694.47, her share of proceeds of lands of the same grandfather, situate in Pennsylvania, sold about the same time, on like proceedings, and which had been invested for the same purpose.

The infant, Emma Oberly, died on the second of April, 1865, aged twelve years, leaving the complainants, Charles Oberly, John F. Oberly, and Robert Oberly, her paternal uncles, and the complainant, Emma Baker, the daughter of her deceased paternal aunt, her only heirs-at-law, besides her mother, who inherited for her life; and leaving her mother and three infant children of her mother by the second marriage, her next of kin.

In 1865, after the death of Emma, the complainant, Charles Oberly, as her guardian, settled his account in the Orphans Court of Warren county, upon which the balance was \$9464.74.

In September, 1865, administration of the estate of Emma Oberly was committed by the surrogate of Warren county to the defendants, Benjamin F. Lerch, Anna Maria Lerch, and

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Jehiel T. Kern, who thereupon sued the complainant, Charles Oberly, the late guardian, in the Supreme Court of this state, for the whole balance in his hands.

The bill in this court is filed to enjoin that suit. The complainants claim that so much of that balance as is made up of the proceeds of real estate, must be considered as real estate, and descend as such ; that the administrators of Emma are not entitled to receive it, but that it belongs to them as her heirs-at-law, subject to the life estate of her mother ; and that they are entitled to have it invested and secured under the direction of this court.

If the complainants are right in their claim, the case is a proper subject of equity jurisdiction. The proceeds of the real estate must be separated from the rents of the farm and the interest of these proceeds, which are personal estate and form part of the balance in the hands of the guardian, and when separated, must be invested for the life of the mother.

The main, if not the only question in the case is, whether the surplus of the proceeds of lands of a decedent, sold by direction of a court for the payment of his debts, which remains after payment of the debts, or the proceeds of lands sold on proceedings in partition because they cannot be divided, when such surplus or proceeds belong to an infant, are upon the death of the infant, to be considered as real estate or as personal estate, for the purposes of succession.

There is nothing in the statutes by which these sales are authorized, to settle the question. The partition act says the proceeds shall be paid "to the parties interested in the real estate so sold, their guardians, or legal representatives, in proportion to their respective rights in the same ;" and the act authorizing lands to be sold for debts, directs that "the surplus money arising from such sale shall be distributed among the heirs or devisees, according to the law of descents in the former, and the will of the testator in the latter case." But this, while it *seems* to regard it as real property, does not give any character to it to guide its transmission after its being converted into money. The disposition of the surplus must have been the same, without this provision. In

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such cases, by the descent or devise, the land had vested in the heir or devisee, subject to the lien for debts, and all beyond that lien would, by settled principles of law, have belonged to the owner of the property before the sale. The provision may show, by the superabundant care in inserting it, that the legislature was very careful not to disturb by a sale the transmission of the proceeds as real estate.

The general rule is, that property is transmitted as real or personal, according to the form in which it exists at the death of the owner. But courts of equity, by the doctrine of equitable conversion, now well established, hold that in certain cases, property actually existing in one form shall, for transmission, be held to be in the other. This doctrine of notional conversion, as it has been termed, is applied in cases where, by a will or marriage settlement, money is directed to be laid out in land, or land converted into money, to carry out the object of the will or settlement. In such case, it is considered in equity to be the kind of property into which it is directed to be converted, from the time the change should have taken place, whether such conversion is actually made or not; and this theoretical conversion is considered in equity to continue until the ownership vests in some person who would have the right to convert it from one kind to the other, and who, when of legal capacity, accepts it, or does something to recognize it or give it character in the shape in which it exists. Until this is done, it must retain the character of real or personal impressed upon it by the last absolute owner who had such power over it. *Fletcher v. Ashburner*, 1 *Lead. Cas. in Eq.* [671]; *Wheldale v. Partridge*, 8 *Ves.* 235; *Craig v. Leslie*, 3 *Wheat.* 563; *Sweezy v. Frazer*, 1 *Duer* 301 and 306.

An infant or lunatic cannot elect, and therefore cannot change the character impressed upon the property. *Leigh & Dalzell on Equit. Conv.* 182; *Seeley v. Jago*, 1 *P. W.* 389; *Notes to Fletcher v. Ashburner*, 1 *Lead. Cas. in Eq.* [684]; *In re Wharton*, 5 *De G., M. & G.* 33.

The question in this case is, when land is by legal proceed-

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ings converted into money for a definite purpose, whether the proceeds are to be considered as converted into money, except for that purpose, and whether they do not for all other purposes retain their character as land. It is contended that on a sale for the payment of debts, the surplus not needed for debts remains real estate, and that on a partition sale the proceeds are personal only for the purpose of division; that for all other purposes they must be considered to remain as real.

The question is not the same as when one species is directed to be converted into the other by a will, or a marriage settlement. Yet it is placed upon the same principle, which is, that property shall retain the character impressed upon it by the last absolute owner, until that character is changed by some one having like power over it.

In this state, there is one case in which this question has been brought up for decision; the case of *Snowhill v. Snowhill*, in 2 *Green's C. R.* 20. In that case, the lands of an infant had been sold by virtue of a special act of the legislature; the act authorized the sale, and directed the proceeds to be invested, and one-third of the interest to be for the use of the mother of the infant, and two-thirds for the use of the infant, and gave no directions as to the principal. The infant died under age, without issue, and his mother obtained administration of his estate. The bill was filed against the administratrix by his heirs-at-law, who claimed that the proceeds retained the character of real estate, and descended to them as such. This brought up the precise question that we are considering here. Chancellor Vroom, in a well considered opinion, held that the doctrine of equitable conversion only applied in cases of fraud or breach of duty; but where property was *lawfully* changed in character by the legislature, that the heir or next of kin must take it as it actually exists, and that the proceeds of sale in that case must pass as personal property; and he dismissed the bill. On appeal to the Court of Errors, this judgment was reversed. The decision in that court is not reported, but the result

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appears in a subsequent proceeding in the same case, in this court, reported in 1 *Green's C. R.* 30. There Chancellor Pennington gives effect to the decision of the Court of Errors as establishing the right of the heir-at-law to the proceeds of the sale.

This decision upon the very point, by the highest court in the state, should be considered as putting the question at rest. But it is contended that the decision is against the clear weight of authority, and as no opinion was delivered, and no principle was settled by the Court of Errors, that the utmost extent to which it should be held binding, is in cases like that in which it was made, that is, sales by virtue of a special statute. This, perhaps, might be a correct view, if the decision was against a well established principle, or against a series of well considered cases, uniform or nearly uniform in their rulings. Or, there may be cases in which it might be wise to bring up for consideration an opinion of that court, when it seems to be made without due and full consideration of the principles that should have guided it.

But on this point, the decisions in courts that ought to have weight here, are very conflicting and apparently irreconcilable. Most of the decisions in England, referred to on the argument, have no real bearing on the point. The case of *Ackroyd v. Smithson*, reported in 1 *Bro. C. C.* 503, and in 1 *Lead. Cas. in Eq.* [690], with the full and learned notes of the English and American editors, does not decide the point. That case contains the very able argument of Mr. Scott, afterwards Lord Eldon, which induced Lord Thurlow to decide for him, against his preconceived opinion, so fixed that he at first declined to hear the adverse counsel. But it only decides that when a testator had ordered his land to be sold and converted into money to pay certain legacies, two of which had lapsed by death in his lifetime, that the amount of these lapsed legacies descended to the heir as real estate. The cases of *Wright v. Wright*, 16 *Ves.* 188; *Hewitt v. Wright*, 1 *Bro. C. C.* 86; *Smith v. Claxton*, 4 *Madd.* 484; *Dixon v. Dawson*, 2 *Sim. & Stu.* 327, and *Jessopp v. Watson*,

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1 *Mylne & K.* 665, decide the same point; but they hold further that it goes to the heir, and is held by him as personal estate. That it should go to him as if real estate, does not affect the present question; the property existed in land at testator's death, and as his intention of disposing of it failed by the lapse, the land, or the interest in it, undisposed of, descended to the heir at the testator's death; and when the land was sold, the proceeds belonged to the heir. Holding that these proceeds, when in the hands of the heir, were personal estate, seems at first to be more directly on the point, as it settles the continuance of the character of the property. But in all these cases, the testator, the last absolute owner, had directed a conversion out and out, of the property; he had the power to change and did change its character; he failed to dispose of it, and before it was changed, either actually or by the theory of equitable conversion, the title vested in the heir; and necessarily it vested in him as money, the character so fixed.

There are many other cases in which the proceeds of lands directed out and out to be converted into money, have been held, for want of any valid disposition of them by the testator, to go to the heir. *Collins v. Wakeman*, 2 *Ves.* 683; *Fitch v. Weber*, 6 *Hare* 145; *Robinson v. London Hospital*, 10 *Hare* 19; *Shallcross v. Wright*, 12 *Beav.* 505; *Gordon v. Atkinson*, 1 *De G. & Smale* 478; *Taylor v. Taylor*, 3 *De G., M. & G.* 190.

But all the effect these cases have here is, that they show the leaning of the English courts is in favor of the heir, and that he is not to be disinherited except by a valid and express disposition of the estate.

The case of *Oxenden v. Lord Compton*, 2 *Ves.* 70, is more in point. There, the proceeds of timber cut on a lunatic's estate were held at his death to pass as personal property. And Lord Chancellor Loughborough remarks that there is no "equity between the real and personal representatives. Both are volunteers. Each must take what they find at the death of the person entitled for life, in the condi-

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tion in which they find it." And he holds that the court, in administering the estate of a lunatic, will not regard the interest either of the heirs or the next of kin, but only that of the lunatic. The force of this case is, perhaps, somewhat affected by the fact which appears by the case, that the timber cut was in a state that required it to be cut for the benefit of the estate, and that the cutting was only taking the produce of the estate in the usual way, and therefore, the proceeds were at all events personal estate.

The case of *Flanagan v. Flanagan*, as stated by Sir Thomas Sewell, Master of the Rolls, in his masterly opinion in *Fletcher v. Ashburner*, 1 Bro. C. C. 497, is an authority in favor of the proceeds of lands unnecessarily sold, being considered for transmission, as personal estate. And its effect is not explained away by Mr. Scott, in his remarks upon it in *Ackroyd v. Smithson*.

The case of *Cooke v. Dealey*, 22 Beav. 196, decided by Sir John Romilly, Master of the Rolls, is much like the present. The real estate of the decedent had been sold by order of the court, for payment of debts and legacies. More was raised by the sale than was needed. The devisee died after the sale. The suit was between her administrator and her heir; and the sole question was whether at her death it passed as real or personal estate. It was held that it passed to the heir as real estate. Sir John Romilly remarks: "More of the real estate was sold than was necessary; of course the conversion is complete to the extent to which the purchase money was required for the particular object for which the sale took place, namely, for the payment of debts and costs, but the excess, though in the form of money, remained as before, impressed with the character of land."

In the *Matter of Wharton*, a lunatic, 5 De G., McN. & G. 33, the real estate of a lunatic had been sold by order of the court, by virtue of the *Stat. 11 Geo. IV*, and 1 *Will. IV*, which enacts that the proceeds of the estate sold "shall be of the same nature and character as the estate sold." The sale was in 1829. Wharton, the lunatic, died in 1841, leav-

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ing an heir who was also a lunatic incapable of electing, and who died in 1842, intestate, and without having received the money. It was held by the Lords Justices, that at the death of the lunatic's heir, it passed as real estate to his heir-at-law, and not to his next of kin. The statute controlled the first transmission; the second was upon the principle, that money impressed with the character of land remains such until it is accepted as money by its absolute owner, of sufficient capacity to make such election.

In the state of New York, the case of *Bogert v. Furman*, 10 Paige 496, is like the present. It was as to the surplus moneys, arising from the sale of lands to satisfy a mortgage. One of the owners of the equity of redemption died after the foreclosure and sale, but before the surplus was distributed. It was held by Chancellor Walworth, that this surplus was personal estate, and went as such to the next of kin. The principles contained in the cases on the subject were not discussed at the bar, nor do they appear to have been investigated or considered by the Chancellor. The decision has, however, the authority of this eminent jurist.

In the case of *Graham v. Dickinson*, 3 Barb. C. R. 170, lands of the testator had been sold to pay his debts. Subsequently, personal estate of the testator was realized from claims against the French government, sufficient to liquidate these debts. It was held that the devisees, whose lands had been sold to pay debts, were entitled to be reimbursed out of the personal estate so recovered, that being the fund primarily liable to debts; but that in case of devisees who died before the recovery, their claim against that fund was personal estate, and went to the next of kin. This case decides nothing that bears upon the point in question. The claim of the devisee at his death was a chose in action, a mere personalty. It was not to the proceeds of the sale of real estate; but a mere right of action, growing out of a maladministration of the estate. But in the opinion of Vice Chancellor Hoffman, he says, that the surplus of a sale of mortgaged premises made in the lifetime of the mortgagor is personal estate, but

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if made after his death, his devisee would take. "But she would have taken such surplus as money, not as land. And the devolution from her would be altered accordingly." This seems to conflict with his subsequent opinion in *Sweezy v. Thayer*. In that case, reported in 1 *Duer* 286, it is expressly held that the surplus of the sale of mortgaged lands, under a decree of foreclosure, where the equity of redemption at the time of the sale belonged to a minor, who subsequently died under age, was to be deemed real estate, and at his death would go to his heirs, and not to his next of kin. The referee, Murray Hoffman, and the Superior Court, by Justice Bosworth, in very able and well considered opinions in which the cases are reviewed, agree in this result.

In Massachusetts, in *Emerson v. Cutler*, 14 *Pick.* 108, it was held, in an opinion delivered by Chief Justice Shaw, that the overplus of the proceeds of the land of an infant, sold by license of the court for the benefit of the infant, at her death under age, was personal estate, and passed to her administrator. This case differs somewhat from that under consideration; as in it, the land was sold for the very purpose of converting it into personalty for the benefit of the infant. It was not a dispute as to a surplus above the purpose for which the land was sold.

The case of *Merick v. Bavier*, 6 *Ired. Eq. Rep.* 524, was like the present as to the surplus proceeds of lands sold by order of a court to pay debts. The sale was in the lifetime of the infant heir, who died under age. The court held that the land was converted into money, only to the extent of the object of the sale, the payment of debts; and that the surplus remained real estate, and at the infant's death descended to her heirs.

In Pennsylvania, the decisions conflict. In *Grider v. M'Clay*, 11 *S. & R.* 224, decided in 1824, it was held, in an elaborate and well considered opinion delivered by Chief Justice Tilghman, that the surplus of lands sold for debts of the ancestor in the lifetime of an infant heir who died under

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age, at the death of the infant, was personal estate, and went to the next of kin.

The decision in *Dyer v. Cornell*, 4 Barr 359, made in 1846, approves of that in *Grider v. M'Clay*, and holds that the proceeds of an infant's lands, sold by its guardian, are personal estate, and on the death of the infant, under age, go to the personal representative. This is the point ruled in *Emerson v. Cutler*.

In *Biggert v. Biggert*, 7 Watts 563, decided in 1838, it is held that a sale in partition proceedings converts lands into money for transmission, at the death of an infant tenant in common.

On the other hand, *In re Tilghman*, 5 Whart. 44, decided in 1839, it was held that the proceeds of an infant's lands sold by virtue of an act of the legislature, on the death of the infant under age, remained impressed with the character of real estate, and went as such to her heir-at-law. This case is precisely the same as that of *Snowhill v. Snowhill*, and was decided about the same time.

Again, in the case of *Lloyd v. Hart*, 2 Burr 473, decided in 1846, the question was, as to \$3000, the surplus of the proceeds of the lands of a lunatic, sold by order of the court for the payment of his debts. Chief Justice Gibson delivered the opinion of the court, and, on an able discussion of the question, held that this surplus must be considered, at the death of the lunatic, as real estate, and must go to his heirs.

After this review of the authorities, I cannot consider that the decision of the Court of Errors, in *Snowhill v. Snowhill*, was against a well settled principle or the decided weight of authorities, and that it should be, therefore, if not disregarded, confined to cases in the precise circumstances of that case. On the contrary, it appears to me that the preponderance of the conflicting authorities is, on the whole, with that decision; and that the principles and reasoning on which the question ought to be decided, is also with that decision.

It is also in accordance with the spirit of the legislation

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of the state in other matters. The provision of the act under which this sale was made, put there for abundant caution, shows that intention. And the provision expressly made in the act authorizing the sales of lands of infants, that the nature of the estate should not be changed by the sale, evinces the same spirit. And while it is the doctrine of this court that the property of an infant or lunatic must be managed for the benefit of the owner only, and not for that of his heirs or next of kin, it is wise to hold that neither shall gain or lose by the change of its character; so that neither class will be tempted to procure a sale when it is not for the owner's benefit, or to defeat it when it would benefit him, as may, in the end, be for their own advantage. Some such persons generally have the management of the infant's estate; and, although the sale is ordered by the court, yet they have it in their power in these *ex parte* applications, so to place the matter before the court as to procure the decision they desire. In this very case the sale was an extraordinary one, and the parties who procured the order appear here to claim the benefit of the change. The rule established in *Snowhill v. Snowhill* is based upon high grounds of public policy, and I do not feel inclined to disturb it.

As to the proceeds of the lands in Pennsylvania, they must be governed by the law of that state. Its statute relating to partition proceedings and the money invested for the widow's dower, simply directs "that at her death it shall be paid to the persons legally entitled thereto." *Purdon's Dig. of 1861*, p. 298, § 152. And in *Hise v. Geiger*, 7 W. & S. 273, it was held that it must be paid to the heirs of the intestate, and not to his administrators.

This settles, that if Owen Oberly was living he would be entitled to these proceeds, but does not determine what character they would retain, or to whom they would go at his death. But on the authority of *Biggert v. Biggert*, which is upon the proceeds of a partition sale, and, among the conflicting decisions in that state, approaches nearer this case than any other, I will hold that these proceeds, at the death of Owen Oberly, were personal estate, and were transmitted

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to and by his daughter as such, and that they belong to her administrators.

The principal of the proceeds of the sale of lands in Warren county, including the proceeds of lands of John Oberly and the surplus of the sale of lands of Owen Oberly, belong to Anna Maria Lerch, for her life, as heir of her daughter Emma, and must be invested under the order of this court, and the interest thereon, including the interest from the death of Emma, must be paid to her. At her death, the principal, and the principal invested for the dower of Anna Maria Lerch, must be divided equally among the three uncles, and Emma Baker, as the heirs-at-law. The residue of the fund in the hands of Charles Oberly is personal estate, and must be paid to the administrators of Emma Oberly.

The motion must be denied.*

CLARK vs. CONDIT and others.†

1. A deed absolute on its face, intended and made only as security for a debt, is a mortgage. When the defeasance or agreement showing that it is such security is in writing, the statute declares it to be a mortgage, and requires it to be registered as such.

2. An equity of redemption is a right or estate in lands, and cannot be released or conveyed except by writing. No verbal agreement will convert a mortgage into an absolute deed. Whether a surrender and cancellation of a written defeasance would, doubted.

3. If a mortgage was given in the form of an absolute deed, and the defeasance withheld from the records for the purpose of misleading and delaying the mortgagor's creditors, the right of redemption will not thereby be lost. In such case, the aid of the court is not asked to enforce a fraudulent instrument. The fraud, if any, is in the deed not in the defeasance which the complainant claims to enforce according to its legal effect. The defeasance is honest as between the parties, and was not to injure creditors.

4. A power to sell mortgaged premises for the payment of the mortgage debt, given to the mortgagee by the mortgage, is a valid power. It is liable to great abuse, and the exercise of it will be jealously watched. But sales under it, fairly made, will not be set aside.

* Decree affirmed, *post* 575.

† CITED in *Phillips v. Hulsizer*, 5 C. E. Gr. 314; *Crane v. Decamp*, 6 C. E. Gr. 417.

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Mr. T. Runyon, for complainant.

Mr. J. W. Taylor, for defendants.

THE CHANCELLOR.

The complainant, John H. Clark, on the thirtieth day of December, 1859, owed John J. Searing about \$6000, to secure which he had conveyed to him ten tracts of land in the city of Newark, by a deed absolute on its face, taking from him a separate defeasance. Searing wanted his money. The complainant owed the defendant, Condit, and proposed to borrow money from him to pay off Searing, and offered to him the land held by Searing as security for the amount due to him, and the amount so to be advanced. Condit agreed to advance the money and take a conveyance of the property as security, and to substitute his bonds and mortgages on the property for two bonds and mortgages given by Searing on the same to David Doremus, for debts of Clark, amounting to \$9000.

In pursuance of this arrangement, Searing, on the thirtieth day of December, 1859, conveyed the ten tracts to Condit in fee, and Condit gave his bonds and mortgages to Doremus, in place of those of Searing. Clark gave to Condit his promissory note for \$9194, payable in two years, with interest at seven per cent.; it being the amount of the debt due from him to Condit, and that due from him to Searing, which Condit had paid. The deed to Condit was absolute on its face, and was recorded as a deed. At the same time, Condit and Clark executed a defeasance under their hands and seals. This recited that the conveyance had been made by Searing to Condit, at the request of Clark, to secure to Condit the payment of the note, and provided that if Clark should pay said note when due, Condit would convey to him the lands free from all encumbrances, except the two mortgages to Doremus. And it was provided that in the meantime Clark should collect the rents and pay the interest to Doremus, and pay for repairs, insurance, taxes, and assess-

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ments ; and further, that in case Clark should fail to pay his note at maturity, that Condit should have power to convey the lands, or so much thereof as he might choose, and out of the proceeds pay himself the amount due on his note, and the expenses of sale.

There was, at the time of the conveyance to Condit, a prior mortgage on the premises to Lewis J. Lyons, for \$2000, which was not mentioned in, or provided for by the agreement of defeasance, and which Condit alleges was not known to him. This mortgage Condit has paid.

On the sixth day of September, 1861, the complainant sold and conveyed to Condit the tools and implements of his trade, valued at about \$1000. This sale was for the same purpose as the conveyance of the land, and it was agreed between the parties, that the written defeasance should apply to this so far as practicable, in the same manner as it did to the land.

Shortly after the deed to him, Condit assumed the control of the property, received the rents, and paid the taxes and the interest on the three mortgages, and other expenses incident to the property. Clark paid neither the principal nor interest on his note when due, nor the interest on the mortgages, insurance, or taxes, as he was bound to do. In 1863 he removed to California, and left Condit in possession and control of the property. Condit retained Clark's note, and Clark retained the defeasance. There was no agreement or understanding, either by parol or in writing, about either being surrendered, or about the equity of redemption of Clark, if he had any, being released or surrendered.

After the note was due, Condit sold four parcels of the property to the other defendants in the cause. In March, 1864, he sold the ninth tract to Sarah E. Bogert, for \$1800. In October, 1865, he sold another parcel to Griswold & Sheldon, for \$9500. In April, 1866, he sold another parcel to Nicholas Duffy, for \$1900, and on April sixteenth, 1866, he sold another parcel to the defendant, Bridget Davis, for \$3800. These sales were made at private sale, and without any

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notice to the complainant, who was in California. The brother of the complainant, who resided on part of the property, heard of these sales when they were in contemplation and the bargains being made. He requested Condit not to sell for these prices, which he alleged were inadequate; and he gave notice to each of the purchasers, before the sale in each case was complete, that Condit had no right to sell, that the complainant had a claim, and that they would buy litigation. The purchasers completed the sales, relying on Condit's deeds, with warranty.

The defendant, Condit, alone has answered. The other defendants have allowed the bill to be taken as confessed. Condit admits the facts, as above stated, but contends in his answer: First, that this was an absolute deed, and was not subject to redemption after the day for the payment of the note, if the note was not paid: Secondly, that the property conveyed to him was not of any greater value than the mortgage debts upon the same, and the amount due to him on his note; and he alleges in his answer under oath, that at the time of said conveyance to him they were valued by him and the complainant, Searing, at only \$20,000, and that both he and the complainant then considered that they could not be sold for sufficient to pay the note and encumbrances, and that the complainant shortly after, in fact, released or surrendered whatever equity of redemption he ever had therein, and abandoned the property to him: Thirdly, that the conveyance was made by the complainant to him in the form of an absolute deed, with a secret unrecorded defeasance, for the purpose of enabling the complainant to delay and defraud his creditors, he being embarrassed and having judgment creditors whose judgments would be liens on the equity of redemption if the security had been given and recorded in the shape of an ordinary mortgage; and that the complainant is not entitled to any relief in a court of equity, in a transaction done to defraud his creditors.

There can be no question but that the deed to Condit from Searing was a mortgage. Any conveyance, though absolute on its face, which is intended and made only as a security for

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a debt, is a mortgage. *Youle v. Richards, Saxt.* 534; *Clark v. Henry*, 2 *Cow.* 324.

The case is much clearer when the defeasance or agreement showing such intention, is in writing. In such case, such absolute deed is, by the act to register mortgages (*Nix. Dig.* 550, § 4,*) declared to be a mortgage, and required to be registered as such; and the grantee is deprived of all the advantages of the registry acts unless it be so registered, and an abstract of the defeasance registered with it.

There is no proof whatever to sustain the second defence, that the equity of redemption was released or abandoned. The complainant retained his defeasance, and Condit the note. No one act of the complainant is shown, that in any way proves even an intention to release or abandon the right to redeem. The allegation in the answer is not responsive, and proves nothing. Besides, the equity of redemption being a right to real estate, cannot be released or surrendered except by writing. *Browne on Stat. of Frauds*, § 229. No parol understanding or agreement can convert a mortgage into an absolute deed; once a mortgage, always a mortgage, is the well established maxim of equity. Some cases have held that a surrender and cancellation of the writing of defeasance may destroy the right to redeem. But the authority of those cases may be well questioned unless when, as was the case in *Youle v. Richards, Saxt.* 534, such cancellation is upon adequate consideration, and accompanied by a receipt in writing signed by the party, showing the intention.

The third defence is, that this conveyance was made to Condit in this form by the complainant to defraud and delay his creditors, and therefore a court of equity will give him no relief against it; and that, although Condit may have been privy to the fraud, yet in such case the maxim *in pari delicto potior est conditio possidentis* will protect him. In the first place, the evidence that it was done for the purpose of delaying creditors is very meagre; it is only the admissions of the complainant in his examination upon the return of an

* *Rev.*, p. 706, sec. 21.

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execution, and these hardly amount to proof of that intent. Besides, if the allegations in the answer of Condit as to the value of the property at that time are true, there was no fraud on creditors. The property was mortgaged for *bona fide* debts, was worth nothing beyond the amount of these debts, and could not have been sold for that amount.

Again, the settled principle is that such conveyances, although void as against creditors, are valid as between the parties to them. 1 *Story's Eq. Jur.*, §§371, 425.

It is the conveyance alone that could delay or defeat creditors. That alone could be held void as against them; as between the parties, the complainant could not question it. The defeasance upon which the complainant relies is free from all fraud; it was honest as between the parties; it could not injure creditors, and they could not impugn it. By the effect of it the complainant, in equity, is owner of the land, subject to the liens of Condit; he is the party in *possession* of the title, and would have the advantage of the maxim if it were applicable.

This bill is not to set aside the mortgage as illegal or fraudulent, or for any relief against it; but for permission to pay it off and redeem the property, giving the whole transaction its legal effect.

The defendant, Condit, must then be considered in the light of a mortgagee in possession, after condition broken; that he holds subject to the right of the complainant to redeem; and he is bound to account to the complainant for all the rents and profits received from the property. He is entitled to be allowed for the amount of principal and interest due on the note to him, and to the amounts paid by him upon the mortgages on the land; also, to all amounts paid for taxes, assessments, and repairs.

The complainant will be entitled to redeem the property, both real and personal, upon paying the excess, if any, of the amount allowed to the defendant, Condit, above the amount charged to him; and if the amount charged to Condit exceeds the amount due to him, the complainant will be entitled to a decree for the same, and to a re-conveyance of the property.

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A different question arises between the complainant and the other defendants, who have purchased parts of the mortgaged premises from Condit. The defeasance expressly provided that after default in payment of the note to him, Condit might sell the property or any part of it. If such power of sale is valid in equity, these sales, made by virtue of it, cannot be set aside by the complainant, unless fraudulently or irregularly made.

The validity of such power of sale in a mortgage was at first doubted, although there seems to be no case in which sales were held void on that account. The doubt was first raised by some remarks of the court in the case of *Croft v. Powel*, *Comyn's R.* 603, and was continued by the observations of Lord Eldon in the case of *Roberts v. Bozon*, reported in 1 *Powell on Mort.* 9 *a*, note.

But neither the decision nor the dicta of the court in *Croft v. Powel*, when properly considered, are adverse to the validity of such power. And the observations of Lord Eldon are upon the expediency of such powers, which had been lately introduced by some conveyancers, and the abuses that might be practised by mortgagees under them. There is no reason why the absolute owner of the fee should not have the power to authorize any one to sell it for his benefit, except that when given to a mortgagee he might, for his own advantage, abuse the trust. Upon principle, the mortgagor clearly has such power. In New York, it has been acknowledged and regulated by statute since 1774. And the validity of sales made by virtue of such powers is now supported by authorities that place it beyond serious question. 1 *Powell on Mort.* 10 and 12 *a*, note *K*; *Coote on Mortgages* 128; *Corder v. Morgan*, 18 *Ves.* 344; *Clay v. Sharpe*, *Ibid.*, note, p. 346; *Matthie v. Edwards*, 2 *Collyer* 465; *Demarest v. Wynkoop*, 3 *Johns. C. R.* 144; *Eaton v. Whiting*, 3 *Pick.* 484; *Kinsley v. Ames*, 2 *Metc.* 29; *Waters v. Randall*, 6 *Metc.* 479; *Anonymous*, 6 *Madd.* 15.

But these cases also hold, that such sales, especially when made by the mortgagee himself, must be made with care and

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regard to the interest of the mortgagor, and in a way to obtain the best price for his property; that when the property sold without such precautions has been sacrificed, or sold materially below its value, the sale will be set aside, or the purchaser be decreed to hold title, subject to the equity of the mortgagor to redeem.

In this case, I find no evidence to sustain the allegations of the bill, that the property sold was sold much below its value at the time of sale. There are in the evidence, appraisements of the value of lots designated by street numbers and by size; but I find nothing by which I can apply any of those valuations to either of the four parcels sold, except in case of the lot sold to Sarah E. Bogert, which is valued at the price that she paid for it.

The sales to these defendants must, therefore, so far as they are concerned, be held to be valid, their titles confirmed, and the injunction as against them dissolved. I incline more to this opinion because the complainant aided in placing the recorded title in such position as would mislead them. Instead of having the transfer to Condit placed on the records as a mortgage, which it really was, it was, contrary to the registry acts, recorded as an absolute deed; and although these purchasers had some notice given to them that the complainant had some claim, they were not informed what that claim was. The best and most absolute title may be assailed by such notice through irresponsible parties; they chose to rely on the representation and warranty of Condit, supported by the absolute conveyance they found upon the record, which, if it was false and deceived them, was placed there in that form by the contrivance of the complainant for the purpose of misleading the public. And if the property was really sold at a sacrifice by Condit, the complainant will be entitled to charge Condit with the amount of his loss.

Condit must account for the amounts received for the sale of the four parcels of property. And although it does not sufficiently appear in the evidence that these sales, or either of them, were made at a sacrifice, yet it does appear that

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Condit made these sales in the absence of the complainant, and without notice to him, against the remonstrances of his brother, who represented to him that the prices were below the value; and they were all at private sale, on his own discretion only. The complainant may, therefore, if he desires it, have it referred to the master to inquire whether these sales, or either of them, were below the fair value of the property at the time of sale, and how much. And the defendant, Condit, must be charged, in addition to the price received by him, with the excess of such value above the price. The account must be taken with yearly rests, and interest charged upon balances of principal only at such rests; the receipts, after payment of taxes, assessments, interest, repairs, and insurance, to be first applied to the interest due on the note of the complainant, and the balance, if any, on the principal. The interest must be computed at seven per cent., but in no case must interest be charged upon interest except the interest advanced on the three mortgages.

BENTLEY vs. WHITEMORE.

1. Where a resident of another state, by a preferential assignment valid there, conveys all his property to assignees, for the benefit of his creditors, and includes in it lands in this state, the assignment is void as to the lands in this state, and a purchaser from the assignee acquires no title.

2. If a mortgage on lands is paid off by the purchaser of the equity of redemption, and canceled in fact and on the record by the purchaser, while under the misapprehension that his title is good, he cannot, upon discovery that his title is not good, have the canceling set aside and the mortgage declared in force, on the ground that had he then known of the defect in his title, he would have taken an assignment of the mortgage to protect his title. The mistake must be a mistake as to matter of fact, and not as to a question of law.

This cause was argued on final hearing, upon the bill and cross-bill.

Bentley v. Whittemore.

Mr. S. Tuttle, for complainant.

Mr. A. S. Pennington, for defendant, Kumbel, cited—

Chapman v. Hunt, 1 *McCarter* 152; *Stokes v. Middleton*, 4 *Dutcher* 33; *Hutcheson v. Peshine*, 1 *C. E. Green* 167; 1 *Story's Eq. Jur.*, § 167; *Willard's Eq. Jur.* 64; *Norton v. Marden*, 15 *Me.* 56; *Haven v. Foster*, 9 *Pick.* 112; *Raynham v. Canton*, 3 *Pick.* 293; 1 *Story's Eq. Jur.*, § 165; *Simmons v. North*, 3 *Smedes & Marshall* 67; *Trenton Banking Co. v. Woodruff*, 1 *Green's C. R.* 125; *Lilly v. Quick*, *Ibid.* 97; *Miller v. Wack*, *Saxt.* 214; *Merselis v. Vreeland*, 4 *Halst. C. R.* 223; *Robinson v. Sampson*, 23 *Me.* 388; *Gouverneur v. Titus*, 6 *Paige* 347, 352.

Mr. J. W. Taylor, (with whom was *Mr. C. Parker*,) for the judgment creditors.

I. The judgments of Anable, Walker, Howard, and Hempstead, are admitted by the pleadings to be valid against John Whittemore, and to have been obtained upon *bona fide* debts, contracted and existing previous to May 28th, 1857, the date of the assignment.

1. The bill alleges their existence.

2. The answer in response, affirms their existence, validity, consideration, &c.

3. The complainant has not overcome the statements of the answer by any testimony. 2 *Greenl. Ev.* (6th ed.) § 284.

II. The pleadings also admit that previous to May 28th, 1857, the date of the assignment, the real estate in question was the property of Whittemore.

III. Therefore, unless the title to the premises has passed from Whittemore since May 28th, 1857, the judgments are valid liens thereon.

IV. There is no pretence of any transfer except by the deed of assignment; but that was void and inoperative, and effected no transfer for two reasons, viz.:

A. It contained preferences, and was therefore void by our statute. *Nix. Dig. "Assignments,"* § 1; *Varnum v. Camp*, 1

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Green's R. 326; *Moore v. Bonnell*, 2 *Vroom* 90; *Hutcheson v. Peshine*, 1 *C. E. Green* 167; *McCullough's Heirs v. Rodrick*, 2 *Ohio* 380; *Rogers v. Allen*, 3 *Ohio* 48; *Burrill on Assignments*, (2d ed.) 360; *Story's Conf. of Laws*, (6th ed.) § 423-4.

To this position it may be objected that the assignment having been made in New York, where the parties thereto were domiciled at the time, "in pursuance of the laws" of that state, it should be enforced here as a matter of comity, especially as against the judgment creditors who are not residents of this state.

To which I answer :

1. It does not appear that it was made "in pursuance of the laws" of New York.

(1.) What are the laws of New York, is a pure matter of fact, to be legally pleaded and proved, like any other matter of fact.

(2.) There is no allegation or averment of it. The only allegation in reference to the matter is, that the assignment was made "in pursuance of the laws of the state of New York," without stating what those laws are. This is insufficient, and amounts to nothing.

2. That the assignment was made, and the parties to it resided, in New York, makes no difference, even though made pursuant to the laws of New York.

That was precisely the case in *Varnum v. Camp*, 1 *Green's R.* 326, and yet the court held the assignment void, even as to personal property in this state. See, also, *Moore v. Bonnell*, 2 *Vroom* 90.

3. Nor does it make any difference that the judgment creditors who contest the validity of the assignment, are citizens of other states.

(1.) They did not become parties to the assignment, acquiesce in it, or receive any benefit from it.

(2.) But whatever effect the *lex domicilii*, *lex loci contractus*, or the domicil of the contestants, may have upon the transfer of movables, it has none whatever upon the

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transfer of immovable or real property, which must be transferred *lege loci rei sitæ*. *Burrill on Assignments* (2d ed.) 360; *Story's Confl. of Laws*, (6th ed.) § 424 *et seq.*, 428 *et seq.*, and cases there cited.

B. It contained a reservation of all "*his household furniture*," contrary to law, even that of New York. *Burrill on Assignments*, (2d ed.) 256, and cases there cited; *Goodrich v. Downs*, 6 Hill 438.

1. If complainant should say that the law of New York exempted all household furniture, it is for him to allege and prove it.

2. But the law of New York, in fact, exempts (or then exempted) only a certain kind and amount of furniture.

V. The deed from Kumbel & Freeman to the complainant transferred only their right as assignees, not any right or title under the mortgage held by Kumbel.

1. It did not purport to convey any other right.

2. If there was any intention or attempt to convey by the deed, Kumbel's right as mortgagee, such right would have merged in the fee.

3. If Kumbel's interest as mortgagee was intended to be assigned, it would have been assigned in the ordinary mode, by assigning the mortgage as such.

4. Besides, there was no intention of transferring the mortgage; *the intention was to do precisely what was in fact done, viz., to cancel and annul the mortgage.*

5. If the note of Kumbel, as mortgagee, passed to Bentley, he is still himself only a mortgagee.

VI. The cancellation of the Kumbel and Morrell mortgages, and the expenditure of money in repairs and improvements by the complainant, give him no title to relief in this court.

1. These acts were done without the knowledge of the judgment creditors.

2. They were not done under a mistake or ignorance of fact, but (if under any mistake), under a mistake or ignorance of law simply, without any ingredient of "misrepresentation,

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imposition, undue confidence, undue influence, mental imbecility, or that sort of surprise which equity uniformly regards as a just foundation for relief." 1 *Story's Eq. Jur.*, § 110, 113, 114, 115, 120, 137, 138, and cases there cited; *Willard's Eq. Jur.* 59; *Broom's Maxims* (5th ed.) 231. See *Champlin v. Layton*, 18 *Wend.* 407; *Garwood v. Eldridge's adm'rs*, 1 *Green's C. R.* 148.

VII. The defendant, Kumbel, has no ground for relief in this court.

1. His mortgage, as appears by his deposition, was given on the eve and in contemplation of the assignment, and if not wholly void for that reason, was a mere technical legal advantage or right, obtained at the expense of the other creditors; an advantage or right which this court will not restore when once lost.

2. He was bound to know the law of this state, where the real estate, with which he undertook to deal, was located, and where the contract was to be performed or consummated. *Merchants Bank v. Spalding*, 12 *Barb.* 302; *Ex'rs of Combioso v. Assignee of Moffet*, 2 *Wash. C. C. R.* 98.

3. Besides, as a part of the common law of New York, where he resided, he knew that the transfer of real estate here must be in accordance with our laws.

4. Moreover, even if it were a mistake of fact, with ordinary diligence, he would have ascertained the law of this state. The law of New York apprised him that the transfer must be according to our law; so he was put upon inquiry. 1 *Story's Eq. Jur.*, (6th ed.) § 146; *Deare v. Carr*, 2 *Green's C. R.* 513.

5. But after all, the mistake was made, not in canceling the mortgage, but in failing to apply the money to the payment of his debt, as he had a right to do.

THE CHANCELLOR.

The defendant, Whittemore, on the twenty-eighth day of May, 1857, conveyed and assigned to the defendants, Free-

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man and Kumbel, all his property, real and personal, excepting his household furniture, in trust to sell and collect the same, and out of the proceeds to pay his debts in the order specified; certain debts amounting to \$26,000, enumerated in schedule A, annexed to the deed, were directed to be first paid, and then all other debts ratably. This deed described a tract of land in New York, and the lot at Paterson, in this state, afterwards conveyed to Bentley; all the other property was conveyed by general terms. Whittemore, Freeman, and Kumbel, all resided in New York, where the assignment was made and executed. Two years before the assignment, Whittemore had given a mortgage on the Paterson lot to Mary Morrell, for \$2000, and twenty days before the assignment he had given another mortgage on the same lot to the defendant, Kumbel, for \$8000. Both these mortgages were duly registered, and were subsisting encumbrances at the date of the assignment. The deed of assignment was recorded in the office of the clerk of the county of Passaic.

On the twelfth day of May, 1858, Freeman and Kumbel sold and conveyed the lot and mill in Paterson to the complainant, by deed dated on that day, in which they are styled assignees of Whittemore. This sale was for the consideration of \$8000, which was expressed in the deed, and was paid by assuming the Morrell mortgage and \$6000 in cash. The mortgage to Kumbel was at this sale given up and canceled in fact, and was canceled on the record of registry two days afterwards, when the deed was recorded. Bentley afterwards paid the Morrell mortgage, and had it canceled of record on the twenty-seventh day of May, 1863, and destroyed the mortgage. Bentley repaired and fitted up the mill at large expense, and carried on his business in it.

The defendants, Hempstead, Anable, Howard, and Walker, were creditors of Whittemore. At different times, from the eighth day of June, 1863, to the thirtieth day of September, in the same year, each recovered a judgment against him in the Supreme Court of this state, and caused an execution to be issued and levied upon the mill and lot sold to Bentley,

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and caused it to be advertised for sale; they contending that the assignment by Whittemore was void by the law of New Jersey, on account of preference to some creditors, and that the title still remained in Whittemore. The bill is filed for an injunction to restrain the sale, and to have the mortgages, alleged to be canceled by mistake, again set up and declared valid liens, to protect the complainant's title.

Kumbel filed a cross-bill, to have the mortgage to him set up as having been canceled by mistake, or rather under misapprehension, as he supposed that the assignment was valid, and that the deed to the complainant conveyed the title,

The defendants, Hempstead and Anable, reside in New York, Walker in Rhode Island, and Howard in New Hampshire; and did so reside at the date of the assignment.

The first question is, whether the assignment of Whittemore is void. The construction of the assignment act on this point, was settled by the Supreme Court in *Varnum v. Camp*, 1 *Green's R.* 526. The court there held that the directions of the first section of the act, that all assignments in trust for the payment of creditors should be for their equal benefit, in proportion to their demands, made that *pro rata* equality essential to the validity of the assignments, and that assignments made contrary to this requirement were void. This part of the act was held to be imperative, although in the same section it was declared that the preference should be void. And this decision has been acquiesced in by the courts and the bar, as the correct construction of that act. In *Goodrich v. Downs*, 6 *Hill* 438, the Supreme Court of New York gave the same effect to a similar provision. And the fact that at the Revision of 1846, after that construction had been given and accepted for years, this statute was re-enacted in the same words, with the approval of the eminent jurists to whom that Revision was entrusted, would almost make that construction a part of the law, and put it beyond the power of the courts to reconsider it.

The only doubt thrown over that decision was by the ruling of the Supreme Court in *Moore v. Bonnell*, 2 *Vroom*

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90. In that case, the court held that as personal property is held to follow the domicile of the owner, and transfers of it made at the place of his domicile must be governed by the law of that domicile, therefore, a preferential assignment of personal property situate in New Jersey, made in New York, by an inhabitant of that state, and valid by its laws, was valid to pass the title to that property as against a creditor living in New York, though as to a creditor residing in New Jersey, it would have been void. The rule that personal property shall be transferred according to the law of the domicile of the owner, and not the law of *rei sitæ*, does not apply when the rights of residents in the state where the property is situate, will be affected by it. This ruling does not affect the decision in *Varnum v. Camp*, as to the construction of the statute; nor does it contravene the application of it in that case, if, as is generally understood, the plaintiff in the execution was a resident of this state. In fact, this construction of the statute is reaffirmed by the opinion in *Moore v. Bonnell*; and it is shown that it did not apply to assignments of personal property, when both the debtor and creditor were residents of the same foreign state, by the law of which it was valid.

But the distinction made in *Moore v. Bonnell*, has nothing to do with the case before us. That was founded on the rule as to personal property. As regards real property, the rule is different. It is well settled in England, and the states where the common law is in force, that the transfer and descent of real property is governed by the law of the state in which it lies. This rule is without exception, and I am not aware of any case, or any authority, in which it is questioned. *Story's Confl. of Laws*, § 424, 428, and 435; *Burrill on Assignments*, ch. XXX, p. 371; *Brodie v. Barry*, 2 Ves. & B. 130; *Birtwhistle v. Vardill*, 5 Barn. & C. 438; *S. C.*, in error, 9 Bligh 32; 6 Bing. (N. C.) 385; *Elliott v. Lord Minto*, 6 Madd. 16; *Curtis v. Hutton*, 14 Ves. 537; *United States v. Crosby*, 7 Cranch 115; *Clark v. Graham*, 6 Wheat. 577; *Kerr v. Moon*, 9 Wheat. 565; *Hosford v.*

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Nichols, 1 *Paige* 220; *Chapman v. Robertson*, 6 *Paige* 627; *Cutler v. Davenport*, 1 *Pick.* 81.

The assignment to Freeman and Kumbel is void as to the lands in this state; it conveyed no title to them, and of course they could convey none to the plaintiff.

The complainant contends, that if the assignment is void, yet he is entitled to have the cancellation of the mortgages set aside, as done by mistake and misapprehension, and, as they were paid by him, that he shall be decreed to be the equitable assignee, and to have priority to that extent, to the defendants. This claim is founded on justice, and ought to be sustained, if it can be, without violating established principles of equity. These two mortgages, when paid and canceled, were valid, subsisting liens on Whittemore's property—valid against him and his creditors; they were paid by the complainant, with the belief that the payment would enure to his benefit.

Courts of equity have power to correct mistakes, and protect from the consequences of them. It is one of the well established heads of equity jurisdiction, and this court has frequently exercised this power in the case of mortgages canceled by mistake. But it is only mistakes as to fact that entitle to this relief. It is well settled, that this court will not relieve for a mistake as to the law. Few transactions would be safe if they could be set aside for a misapprehension of the legal rights of the parties to them. The doctrine is too well settled by authority, and too well supported by the reason on which it is founded, to be disregarded. This principle was considered, affirmed, and applied to the canceling of a mortgage, in the case of *Garwood v. Eldridge's adm'rs*, 1 *Green's C. R.* 145. The same doctrine is recognized in *Lyon v. Richmond*, 2 *Johns. C. R.* 60, and *Storrs v. Barker*, 6 *Johns. C. R.* 170; and is discussed at large by Justice Story, in 1 *Eq. Jur.*, § 121 to 138, who, after an elaborate review of the authorities, arrives at the conclusion, that a court of equity will not relieve a party from the effect of

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his mistake of the law, unless when accompanied by fraud or imposition of the other party.

Although a mistake as to the law of a foreign state is considered a mistake of fact in most cases, yet when a non-resident enters into a contract, to be performed in another state, or relating to lands in a foreign state, he is held to know the law of such state, and in that case, the mistake is one of law. Besides, Bentley, who seeks the relief, and paid the mortgages and canceled them by mistake, was a resident of this state.

The bill and cross-bill must be dismissed.*

HALSTED vs. TYNG and others.

1. A vessel was bought at sheriff's sale, under an agreement by the purchaser with the defendant in execution, that the defendant could redeem, at a certain day, by paying a greater sum, and that for part of that time, the vessel was to be in the joint possession and control of both parties—*Held*, that after the time for joint possession had expired, the defendant in execution had no right to meddle with, or take possession of, the vessel until he had redeemed it; and that taking it out of possession of the purchaser was a trespass.

2. The time fixed in an agreement between a purchaser at sheriff's sale and the owner of the property sold, made upon the sale, for a conveyance of the property back upon the payment of a fixed price, will be made of the essence of the contract, by a provision that failure to pay at the time shall end the right.

3. If a purchaser at sheriff's sale agree to re-convey the property, upon being repaid the purchase money and other advances to be made by him, the amount of which is unknown to the party to whom the re-conveyance is to be made, and upon demand made at the time fixed for re-conveyance, fails to render a proper statement of such advances, the time for re-conveyance will be extended, although made expressly part of the essence of the contract. The party to make payment is not in fault until a proper account is rendered, if demanded.

*The assignment was held valid on appeal; decree reversed accordingly,
4 C. E. Gr. 462.

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Complainant, pro se.

Mr. McCarter, for defendants.

THE CHANCELLOR.

The controversy in this cause is about a submarine boat. There are two questions. The first is, whether the defendant, Tyng, is now, and was, in September, 1865, the sole owner of the boat and entitled to the exclusive possession of it; the second, whether the complainant and his associates are entitled to have the boat conveyed to them upon making payment of certain amounts, according to an agreement made June ninth, 1865; or whether they have lost that right by their laches in making payment or tender.

This boat, claimed to be a very valuable and useful invention, was built by the complainant and his associates, incorporated by the name of the American Submarine Telegraph Company. The boat, when in part constructed, was seized or attached for the cost of its construction, in the city of New York, and on the ninth of June, 1865, was in possession of the sheriff of the county of New York, and advertised to be sold by him on the next day. The complainant was the principal stockholder of the company, and had control of it by holding a majority of the stock issued.

Under these circumstances, on the ninth of June, 1865, a written agreement was entered into between the complainant, and the defendant, Tyng. This recited that the complainant and Tyng contemplated re-organizing together a submarine company, in accordance with a prospectus of the same date, and recited the attachment and contemplated sale. And by it, Tyng agreed to represent the complainant and his associates at that sale, and, if practicable, to buy in the boat and its apparatus for \$2468, or thereabouts, taking the title in his own name, but for the benefit and advantage of himself and the company so to be re-organized; and in case of failure of the organization of said company, for the benefit and advantage of the complainant and his associates, upon their refunding to him, within sixty days from the

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purchase, the purchase money, and other moneys which he might advance to or for the complainant, with interest, and \$750 as commission for his services.

Tyng agreed also to advance to the complainant \$1000. Tyng was to have thirty days from the sale to organize a company, as provided. If he did not organize the company within that time, and Halsted did not extend it, then Halsted and his associates had the right to reimburse to him the purchase money, advances, interest, and commissions, within sixty days from the sheriff's sale, and have the boat and its apparatus re-transferred, upon a written order, to themselves, or any person they should direct.

It was agreed, that pending the organization mentioned, Halsted and Tyng should have joint and equal possession of the boat for finishing, experimenting with, and operating the same, in such manner as they might deem best, and as should be agreed upon. And it was stipulated, that if the purchase money and interest, and all money advanced by Tyng to Halsted, or on his order, with interest and said commissions, should not be repaid to Tyng within sixty days from the sheriff's sale, then (provided the said company should not have been re-organized, as contemplated,) the trust reposed in Tyng should cease, and he should thereupon become the sole and separate owner of the boat, and be released and discharged from all claims, rights, and interests of Halsted and his associates. These associates were defined to be the stockholders of the American Submarine Company at the date.

Tyng, on the tenth of June, as he agreed, bought the boat and apparatus at the sheriff's sale for \$2650, and the title and possession were transferred to him by the sheriff. The boat remained, until August thirteenth, on the premises of the Morgan Iron Works, where it had been built.

The company proposed in the prospectus, was not organized in thirty days from the sheriff's sale, or at all; and Halsted did not extend the time for organizing it. From the ninth of July to the eighth of August, Halsted had the

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right to purchase the boat and apparatus by making payment as provided for in the agreement. Halsted had, by a letter dated June twelfth, 1865, authorized Tyng to advance such money as he might find desirable or necessary to complete and test the boat, and assumed such advances as if made upon his written orders, provided suitable vouchers were produced for his inspection. Under this authority, Tyng had advanced considerable sums of money to complete and test the boat; and on the twenty-fourth day of July, 1865, without Halsted's consent, launched the boat into the water, and took it to Hunter's Point to finish. Halsted became dissatisfied with Tyng's conduct, and angry and re-criminatory letters passed between them, in which Halsted applied to Tyng the most severe and opprobrious epithets, and which would naturally and necessarily induce Tyng to refuse any compromise or any concession, beyond the strict rights which he might be obliged by law to accede to. Halsted, by a letter dated July twenty-fourth, 1865, sent to Tyng, demanded that unless certain propositions contained in it were complied with by the twenty-seventh of that month, Tyng should render him a full and fair account of the moneys expended by him in accordance with the agreement, and of his claim against Halsted and the boat, with the proper vouchers, that he, Halsted, might refund the same, and Tyng re-convey the boat as contemplated by the agreement. This account was not made out or rendered to Halsted; but on the thirtieth day of July, a partial and incomplete account, amounting to \$5776.32, was made out, enclosed in an envelope, directed to Halsted, and left at the office of a Mr. Bradley, for him. This account does not appear to have come to the hands of Halsted until after he had called upon Tyng at his office, on the eighth of August.

On the eighth of August, 1865, Halsted called at Tyng's place of business, in New York, for the purpose of procuring the account, and examining the vouchers. Mr. Tyng was not at his place of business, and no account was rendered, or vouchers shown. Halsted left written notice that he would

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call again for the purpose, and called about two o'clock, and asked for an account and the vouchers, and said he was ready to settle it, and receive the boat. The account was not ready, but a paper purporting to be a memorandum of disbursements upon the boat, was handed to him. These amounted to \$6876.67; the items or particulars were not given; the interest was estimated. One item was \$800, *to be paid* Serrell for services. On its face, it was not an account in any respect, such as the complainant was entitled to have. Tyng said that his clerk was making out a more detailed account. Halsted objected to the amount of this account, and offered to pay \$5000, which he held in his hand in legal tender currency, and to submit the account to referees, and to pay any balance above that sum that might be found due; he to receive back the excess, if it was too much. A dispute and discussion arose, and Halsted left, without having received any more definite account, or being shown the vouchers.

On the eighteenth of September, Halsted and his brother employed a tug boat, and went to Hunter's Point; and in the evening, while the watchman employed by Tyng was absent to get his supper, cut loose the boat, and towed it into the Passaic river. Tyng went in search, found the boat, and procured a search warrant, to have it taken as stolen property.

The bill in this case was filed on the twenty-second of September, 1865, to restrain the officers from delivering the boat to Tyng, and him from receiving it; and praying that, upon his being paid the amount due him according to the agreement of June ninth, 1865, he might be compelled to re-convey the boat and its apparatus to the complainant, and his associates. The boat was afterwards, by both parties, conveyed to trustees, by whom it is held subject to the decision of this court.

There are two questions. The first is, which party is entitled to the possession of the boat. By the sheriff's deed, the title to the boat, and the right to possess it, vested in Tyng. By the agreement of June ninth, Tyng and Halsted had equal and joint possession, during the time allowed for

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re-organization ; that is, until July eighth, 1865. From that time, by virtue of his ownership, uncontrolled by any agreement, Tyng had the sole control of the boat until it should be redeemed. From that time, Halsted had the right, at any hour, to take the boat from Tyng's control and possession by paying the amounts stipulated, but had no right to the joint control and possession. This was both the letter and the spirit of the agreement. The agreement of June twelfth had no effect upon the possession ; it neither enlarged nor diminished the control of Tyng over the boat. Its only effect was that expressed on its face, to obviate the necessity of an order from Halsted for every item expended by Tyng on the boat, and to authorize Tyng to expend such sums as he might deem desirable and necessary to finish the boat.

Tyng's right to the exclusive possession of the boat remained until it should be redeemed, although the authority to expend and advance money on Halsted's account must be considered revoked by the letter of July twenty-fourth, in which Halsted demands an account, and elects to redeem or re-purchase the vessel. All subsequent expenses were at Tyng's own risk.

As the boat was not redeemed and re-conveyed on the eighth of August, Tyng's right to the possession remained ; it was his exclusive property. Halsted had no more right to it than a stranger, or than a pawnor has to an unredeemed pledge. The taking of the boat from Hunter's Point was, to say the least, an unwarranted trespass, and the possession of it must be restored to Tyng, absolutely and unconditionally.

The second question is, whether Halsted and his associates are entitled to have the boat and its apparatus re-conveyed to them, or to such person as they shall direct, upon paying the amount due according to the agreement of June ninth 1865 ; or whether they have lost that right, by not paying the amount within the sixty days, which ended on the eighth of August.

Generally speaking, in such an agreement, time is not of the essence ; but it may be made so by the nature and subject

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matter of the agreement, or by the express stipulation of the agreement itself. In this case it might be a question whether the agreement, from its nature and subject matter, is not one in which time is of the essence. But it expressly makes time the essence of it, by providing that failure to pay at the time, shall end the right.

But although time is the essence of the contract, yet if the failure to comply in time is the fault of the other party, the complainant will not lose his right. In such case, the party claiming the right to be free from his contract by the default of the other party, must himself be without fault. Halsted could not pay, unless Tyng rendered him an account. This account Halsted requested, in his letter of July twenty-fourth; after the receipt of which, Tyng was bound to make out and render his account, and also to cease making any further advances under the letter of June twelfth. The account should have been such as would show on its face, to whom and for what, the moneys had been advanced; and such as, in connection with the vouchers, would have enabled Halsted to judge whether the expenditures had been made to complete or test the boat, and were necessary or desirable for that purpose. Within a reasonable time after the receipt of this letter, such account should have been ready to render to Halsted, at any time that he might call for that purpose; to be examined by him, in connection with the vouchers. He was entitled to know the particulars of every portion of the expenditures, the materials and apparatus purchased, the quantity and price, the nature and amount of services rendered. Such an account was not rendered to him, nor does it appear ever to have been prepared. He went to Tyng's place of business on the last day on which he was to make the tender. Tyng was absent. He left written notice that he would call again at two o'clock. The account then handed to him was such as was not, and ought not to be, satisfactory to him. The vouchers were there, but were not shown to him, or offered to be shown. The memorandum rendered, contained a charge of money *to be paid* to Serrell

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for services. Tyng had no right to charge except for what he had actually paid. After the contracts made by Tyng with them, the charges for Merriam's and Serrell's services were, at least, suspicious. Tyng, although not ready with his account and vouchers, was prepared with counsel to answer or evade Halsted's demands. After his letter to Tyng, Halsted may not have been entitled to courtesy or any indulgence, but he was entitled to justice. He was entitled to a correct, intelligible account, and an exhibition of the vouchers. He was entitled to more than the promise of an account in the future, when it could be made out. Such an account as was handed him, should not have been presented. It was calculated, in his situation with Tyng, to vex and irritate him. The whole scene in Tyng's office shows that Halsted, in what he had a right to demand, was not met in a plain, direct, business-like way. He failed to obtain, if he was not directly refused, what he had a right to have without delay, and what he did demand. He had \$5000 in his hands, in legal tender currency; for aught that appears here, it may have been all he was bound to pay. If it were not, he might have been able, if a proper account had been shown, to procure any amount required in addition to it. This is a sufficient excuse for not paying or tendering the exact amount due. By the fault of Tyng, he could not ascertain it. A court of equity will not, under these circumstances, adjudge that the right of Halsted and his associates to redeem the boat and apparatus is lost.

Halsted, in this suit, is entitled to an account. A decree must be made that Tyng, within ten days after service of a copy thereof, on him or his solicitor, shall render to the complainant a full and correct account of all the advances made by him, with a copy of the vouchers; and that within ten days thereafter he appear in person, with the original vouchers, before a master, to be designated in said decree, at such time and place as he shall designate, with eight days notice, and be examined under oath, touching such account; and that the complainant may, at any time in ten days after

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such examination, tender to Tyng the amount due to him for such advances. And such tender shall have the same effect, as if made within the sixty days limited in the contract of June ninth, 1865.

HARTMAN vs. WOHR AND STEGMULLER.

1. A part of the partners cannot exclude from the partnership one of their number who has failed to pay in part of the amount which he agreed to contribute as his share of the capital; but if part of his capital has been paid in, accepted, and used, and the business has been commenced in the name of the firm, he is a partner until the partnership is legally dissolved.

2. A partner excluded from the business of the firm by the illegal acts of his co-partners, is entitled to an account of profits, and to his share of them, until the partnership is legally dissolved; and is entitled to a decree of dissolution, on the ground of such illegal exclusion from the business.

Mr. Keasbey, for complainant.

Mr. T. Runyon, for defendants.

THE CHANCELLOR.

The complainant, Hartman, alleges that he entered into partnership with the defendants, Woehr and Stegmuller, in the business of brewing lager beer; that shortly after the business was commenced, they ejected him from the concern, and refused to allow him to inspect the books, or to take any part in conducting the business. He prays for a dissolution of the partnership, for an account of the profits, and that his share of the partnership property and profits may be paid over to him.

The defendants deny that there was any partnership, or that he has any right to a share of profits. They admit that they made an agreement to enter into partnership with him, but insist that the agreement was conditioned upon his put-

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ting into the concern \$10,000; that he never put in that amount, but only a part of it, and that, therefore, he was never a partner with them; and that the business carried on by them is on their own account, and that he is entitled to no share of it.

The complainant owned some lots in the city of Newark, well situated for manufacturing lager beer. He commenced his buildings, and after they were partly built, took the defendant, Woehr, in partnership with him, to complete the buildings and carry on the business. They were to contribute equally to the capital, and to share equally in the profits. The complainant conveyed to Woehr one undivided half of the lots. After some further progress in the buildings, on the twenty-third of October, 1865, they agreed to take the defendant, Stegmuller, in partnership with them. He was to be an equal partner, to contribute one third of the capital, and to have one third of the profits. The capital to be paid in, was \$30,000, of which \$10,000 was to be contributed by each partner.

Hartman and Woehr, by a deed dated October twenty-third, 1865, conveyed to Stegmuller one third of the lands and buildings. The value of Hartman's interest in this, was \$5667, as fixed and agreed between the parties, and was received as payment of so much, on account of his \$10,000; no more was paid by him. The other partners contributed their shares by payments made as they were required for finishing the building and commencing the business; each of them paid up in excess of his share; Stegmuller paid in over \$17,000, and Woehr over \$14,000. Articles of partnership were drawn between them, and submitted to them on the twenty-fifth of October, 1865, but they were never signed. Hartman and Stegmuller objected to an allowance contained in them, of \$500 yearly, to Woehr, as the brewer of the concern. In other respects, it is admitted by all the parties that they contained the true agreement between them, and but for this, would have been signed. But notwithstanding the articles were not signed, they went on, the property was

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conveyed, the building was finished, and in January, 1866, the manufacture of beer was commenced, all parties operating together; a firm name was adopted and painted on their wagon; money was raised to carry on the manufacture, by notes drawn in the name of Stegmuller, Woehr, and Hartman, the adopted name of the firm. On the thirty-first day of January, 1866, Woehr and Stegmuller inserted a notice in a public newspaper that the brewery was carried on by them, and that they would pay no debts of John Hartman. Shortly after this, they denied his right or interest in the firm as a partner, and excluded him from the premises, and from the management of the business and property.

They deny that he is, or ever was, a partner, on the ground that he has never complied with the partnership agreement, by paying up his share of the capital. The position taken on their part is, that until that is paid up, he is not admitted as a partner. But this agreement was for a partnership to commence immediately, and to continue for five years. The partners each agreed to pay in \$10,000 of the capital, but it was not a condition precedent. The complainant, by his deed, paid up at the time of the agreement, \$5667 of his share; and the defendants accepted it, and used, and continue to use, the property in the partnership business. Neither of them paid up his share at that time, but at intervals of weeks or months afterwards. But the business of the partnership—the erecting of the brewery, and manufacture of beer—went on; each contributed some capital and labor. The existence of a partnership does not depend upon the fact that each partner has, in all things, complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced or carried on to any extent, there is a partnership. In this case, Hartman put in his property, which was taken, and is still used for the business of the firm; he and his property are liable to all the debts of the firm, not only to the notes given in his name, but to all debts incurred, both before and since the thirty-first of January, 1866; and if the firm is

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unfortunate and fails, he may be stripped of every dollar he is worth. The defendants had a remedy if he did not comply with his engagement; they could have asked for a dissolution, and paid him back the amount he put in, and formed a new partnership. But under this agreement, he was a partner for five years, unless the partnership was sooner dissolved.

It was not dissolved by the advertisement of January thirty-first, or by excluding him from the management of the concern. These may constitute a good cause for dissolution; and as he has prayed for it, and the defendants deny his interest and refuse to admit him as a partner, the dissolution must be decreed.

Hartman, being a partner, is entitled to an account of the profits. Even where the partnership has been legally dissolved, and one of two partners continues to carry on the business, unlawfully using the property of the other in it, the retiring partner is, at his option, entitled to his share of the profits made while his property is thus used; this is settled by a series of well considered cases. See *Story on Partnership*, § 343; *Collyer on Partnership*, § 324. This account must be made, with such allowance for the services of the partners who have carried on the business as, under the articles of partnership, is just; and also with allowance of interest for the amount furnished by them in excess of their share of the capital; and the complainant must be charged with interest on the share of the capital to be furnished by him, that was not paid in

Van Syckel v. Emery.

VAN SYCKEL and others vs. EMERY and others.

1. On a motion to dissolve an injunction, the separate answer of a co-defendant, not included in the injunction, cannot be regarded.

2. In a suit to restrain an action at law by reversioners, for waste in cutting timber, a justification of the waste, not alleged or set up in the bill, will be of no avail on a motion to dissolve the injunction. The right to the injunction must appear by the allegations in the bill.

3. Improvements by a life tenant are no excuse or justification for committing waste; more especially when the waste is to the inheritance, and the improvements are to the fertility of the soil, which may be exhausted during the life estate.

4. What constitutes waste is properly a question of law, and the facts which constitute it ought to be passed upon by a jury. A court of equity will not interfere with or restrain a suit for that object.

5. Whether the estate of a reversioner is vested in such manner as to entitle him to sue for waste, and what shall be the rule of damages, are questions proper to be determined in the courts of law.

This cause was argued upon a motion to dissolve the injunction.

Mr. Bird, in support of the motion.

Mr. B. Van Syckel, contra.

THE CHANCELLOR.

The injunction in this case was to restrain six of the nine defendants, from prosecuting a suit brought by them in the Supreme Court. The six so restrained, have answered; the three not restrained, have also answered separately. On this motion, regard can be had only to the answers of the defendants against whom the injunction issued.

George Apgar, of Hunterdon county, died in 1846. By his will, made shortly before his death, he gave to his widow an annuity of sixty dollars during widowhood, and ordered that his daughter Lydia and her husband should furnish her with

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board and fire-wood ; or, if she choose to go elsewhere, that her board should be paid by his executors out of his estate. And he charged all these matters on his real estate. He also gave his grandson, the defendant, George L. Emery, \$1000, to be paid when he became twenty-five years of age, which he also charged upon his real estate. He also gave to his slave, Phillis, an annuity of \$24, which he charged on his real estate. He then gave his farm and adjoining wood lot, with all the residue of his estate, to his daughter Lydia, for her life ; after her death, to her children when the youngest should attain twenty-one ; should any die before that time, without issue, his share to go to the survivors. If Lydia should die before the youngest was twenty-one, her husband, Nicholas Emery, was to have the use and profits of the estate, until that time. Immediately after the last provision, he directs : “ I do order and direct my executors to have the farm and buildings kept in good repair, and to see that no unnecessary waste or destruction of timber be committed on my said farm, or wood lot adjoining.” He appointed his son-in-law, Nicholas Emery, and his nephew, William Alpaugh, executors. The will was proved by, and probate granted to, Emery. Alpaugh never proved the will nor had letters testamentary.

Nicholas Emery, and his wife, Lydia, took possession of the farm and woodland, and in July, 1855, after the birth of their five children, who are five of the six defendants enjoined in this case, Nicholas sold the wood and timber on forty-five acres of the farm and wood lot, to the complainants, for \$1925. The complainants paid him the money, and cut and carried away the timber. In May, 1863, the five children brought suit against the complainants, in the Supreme Court, for the injury to their reversionary interest in the premises by cutting and carrying off the timber. It is to restrain that suit that the injunction issued.

The complainants contend, by their bill and in the argument, that Nicholas Emery, being the executor, was bound to keep the farm in repair, and to pay the charges on the land

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and for that purpose had the right to sell wood and timber, the cutting of which might otherwise be waste.

They also contend, that the farm was improved by Nicholas, by fertilizing it, and that by his improvements, its value was increased to a greater amount than the value of the timber sold and cut; and that they are in equity entitled to have this increase accounted for and deducted from the damages, if they are liable to damages. Also, that the timber cut was ripe and decaying, and that the cutting was for the benefit of the estate; and that, at the death of Lydia Emery, the growth of new wood and timber will render the land as valuable as if it had not been cut off.

The bill does not allege that the wood and timber were sold for the purpose of repairs, or paying the charges on the estate; and the answers state that they were not sold for, and that their proceeds were not applied to, those purposes; but that they were sold by Nicholas for his own individual benefit, and the proceeds used by him, for himself.

This makes it unnecessary to discuss the question whether, either with or without the order of the court, he could have sold timber for either of these purposes. That question is not presented by the case before me.

It is clear, that the improvements made by Nicholas upon the farm cannot be deducted by the complainants, or by him, if the suit were against him, from the damages, in this court any more than in a court of law. It is without precedent, and against principle. A life-tenant has no right to pull down a house because he has created a park at greater expense. Besides, the improvements are to the fertility of the soil, a certain advantage to the life-tenant, but at the end of twenty years, for which Lydia or Nicholas may live, or of ten years, before which the youngest child will not be of age, the improvements may be used up and gone.

Whether the cutting of this wood and timber was waste, and whether it was for the advantage of the property or not, are questions which can be much better and more appropriately determined in a court of law, than in this court. What

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is waste, is properly a question of law. And the facts which may be held at law to constitute waste, ought to be passed upon and determined by a jury.

Nicholas, by his marital rights, had an estate for the life of his wife, in this property. He had no right to commit waste. If he did commit waste, or injure the inheritance, the persons seized of the reversion have a right to sue for the injury to the reversion, and perhaps for the value of the wood cut, because, when felled, it was their personal property.

Whether the estates of the plaintiffs in the suit at law were contingent, and whether that will defeat their recovery, or lessen the amount of their damages, are proper questions to be determined at law, by the court in which the suit is brought.

The injunction must be dissolved.

STOCKHAM and others *vs.* BROWNING, trustee, and others.*

1. Where an old division line between lands lying on tide water has, for more than forty years, been treated by the owners as extending over the shore, or the lands between high and low water, and regarded as the division line of their right upon the shore, the line so recognized will be established as the line which will govern their rights to reclaim and appropriate the shore under the wharf act.

2. No rule for ascertaining the line by which the shore in front of coterminous shore owners shall be divided between them, has been adopted in New Jersey. But if a line claimed by one of them is more favorable to the other than that given by any of the different rules adopted by the courts of the several states, he will be protected to the line so claimed, unless a different line has been adopted by the owners, by acquiescence or otherwise.

3. The owner of lands along tide waters has an easement in the shore in front of them, and the inchoate right to appropriate them to his exclusive use. But until reclaimed, the fee is in the state, and he cannot maintain ejectment. But as he has a vested right in the shore, he will be protected in equity, against any encroachment on, or appropriation of them.

Mr. Carpenter and Mr. J. Wilson, for complainants.

*CITED in *Stevens v. Pat. & New. R. Co.*, 5 C. E. Gr. 137.

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The complainants and the defendant, Browning, are owners of adjoining land on the river Delaware, in the city of Camden; their respective lands being divided by an ancient line, dating back to 1695, nearly at right angles to the river. The complainants, mill owners, own above said line the shore and flats occupied as a log pond. The division line referred to, originated in the year 1695, when William Cooper, by a deed of gift, gave one hundred and fourteen acres to his son, Daniel Cooper, under which title the defendant holds. This line so created, subsists to this day, and its course, when it reaches the river, is the subject of this controversy.

The defendant, trustee under the will of William Carman, deceased, claims a right to enter upon the accretion of the river, by a line diverging to the right, when he arrives at the point where low water mark was in 1820; the line that he claims below that point, being alleged by him to be at right angles with the shore of the river. The complainants claim the right to continue this ancient line, which is their south line, in the same direction in which it strikes the river:

1. Because the rule of the common law, and the rule heretofore adopted and used in this state, seems to have been to continue the line of division into the river, in the same direction in which it strikes the river.

2. Because such rule has been adopted and acted upon conventionally, by the action and implied agreement of the parties who have heretofore successively held the lands north and south of this line.

3. Because the line continued into the river at right angles to the shore, would not sustain the defendant's claim.

- I. There never has been any controversy heretofore as to this line. It has continued into the river through the quiet successive accretion, in the same direction, from its origin, until this controversy arose by the action of the defendant, by driving piling on the line claimed by him.

The remedy is necessarily by bill in equity, for it respects the shore covered by water, and ejectment, therefore, will

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not lie. But besides this, the court has a general jurisdiction in case of confusion of boundaries. 1 *Story's Eq. Jur.*, § 609; *Wake v. Conyers*, 1 *Eden* 331; 2 *White & Tudor* 318, (1st ed.)

As to the rights of riparian owners. See *Angell on Tide Waters* 171; *McLean, J., Bowman's Devises v. Wathen*, 2 *McLean* 377; *Rice v. Ruddiman*, 10 *Mich.* 125.

So far as I can discover, until of late, the English rule to continue a line between coterminous owners through the accretion, in the same direction in which it has struck the river, was held and acted upon in this state, as it still seems to be in the state of Pennsylvania. The certainty of this rule, and the uncertainty and difficulty in applying the Massachusetts rule, are strong reasons against adopting the latter.

II. But supposing the Massachusetts rule to be adopted in this state, the evidence in the case is clearly against the defendant. The rule is somewhat difficult to ascertain and to apply. The land of these parties lies on a shallow cove, irregularly indented between two headlands, Cooper's Point, and Kaighn's Point, as shown on the map produced. Supposing a straight line to be drawn between these two points, and the line to diverge from its ancient course on reaching the shore of the river, either at high or low water, it would diverge in a direction, south of the ancient line, and not north, as claimed by the defendant.

Where shall the divergence commence? It is claimed by the defendant to commence at a point where was the low water mark in 1820. This point is selected, because so far the question had been conventionally settled, by the action of those under whom the defendant claims, in that year, and always acted upon before.

The rule, as stated above, seems to be the only one applicable to such shore as this, a long shallow cove, irregular in its indentations. The extreme difficulty of applying the notion of entering the river at right angles, is seen in the many cases which have arisen in New England and elsewhere.

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Rust v. The Boston Mill Company, 6 *Pick.* 158; *Deerfield v. Arms*, 17 *Pick.* 41, where its absurdity strikingly appears; a case, however, virtually overruled in *Gray v. De luce*, 5 *Cush.* 9.

III. But it is decisive of this controversy, that the direction of this line across the accretion into the river, has heretofore been conventionally settled. The ancient line approaches the river nearly at right angles, and it may be reasonably supposed it was intended to be run, to give to each an equal proportion of the flats.

It is now assumed, though by no means authoritatively settled, that the right of property extends only to high water mark, contrary to the previously understood rule in New Jersey. Every deed in relation to this property, in which the extent of the line into the river is mentioned, says, "to low water mark." Supposing title, strictly speaking, to go only to high water mark, yet a conventional line of extension may be well considered as established by such description. If the doctrine restricting title to high water mark should be established in this state, titles to the accretion on the shore turned into, or capable of being turned into, valuable meadows, must probably rest on this presumption of an agreement. If co-terminous owners on the river shore describe this line as running to low water mark, the extension thus given to it, they may be presumed to intend to continue, as low water mark recedes further and further into the river.

As to the doctrine of agreement, see note to the case of *Commonwealth v. Roxbury*, 9 *Gray* 451, 522, 523, and cases cited.

THE CHANCELLOR.

The dispute in this case is as to lands on the shore, or between high and low water line, along the Delaware river, in the city of Camden. The parties respectively own adjoining parcels of land bounded by the river; the parcel of

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the complainants lying north of the defendant's parcel. The line separating these parcels above high water mark, is an old line which had divided the two properties for more than a hundred years, and ran to the river on a course about north seventy-nine degrees west. The complainants claim, that this line should be continued as the division line, over the shore, to low water mark. They own an extensive saw mill adjacent to these premises, and purchased the lot in question, adjoining the shore, that they might use the shore in front, for storing and keeping logs and timber. The defendant, Browning, claims that his right in the shore extends north of that division line extended; and, to carry his claim into effect, drove a row of piles from the point where the old division line meets the line of ordinary high water, diverging northwardly from the division line, and running in a straight line to low water mark. The complainants filed their bill in this cause, to restrain the defendant, Browning, from obstructing them in the enjoyment of their rights as riparian owners in the shore in front of their premises, north of the direction of the ancient line, by piles or other obstructions, and to have the line between the parties on the shore, ascertained and established. Browning, the trustee, and the two *cestuis que trust*, who are of age, filed no answer; and the bill was ordered to be taken as confessed against them. The six infant *cestuis que trust*, who are made defendants, have filed, by their guardian, the usual *pro forma* answer. Under this, the testimony was taken by the complainants, which was used at the hearing.

The parcel of land on the north of the ancient line contended for, has been held by one branch of the Cooper family for over one hundred and fifty years, and the parcel south of that line has been held by another branch of that same family, for the same length of time. This line was first created by a deed of gift, from Willam Cooper to his son, Daniel Cooper, dated April sixteenth, 1695. By it, William Cooper, who owned the lands on both sides of that line, fronting on the river Delaware, granted one hundred and

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fourteen acres of it, lying south of this line, to his son Daniel, in fee. This made that line a division line. The complainants deduce title from William, the father; the defendants from Daniel, the son. This line is plainly called for by the conveyances on both sides of it. By a conveyance of the lands on the north side of it, dated in 1769, it is stated to run north seventy-eight degrees and twenty minutes west, to low water mark, at the Delaware river. For more than forty years past, conveyances of lands on both sides of it, by the grantors, under whom respectively both parties claim, describe this division line as running to low water mark on the Delaware river. A deed in 1843, given by John N. Lane and others, for the premises south of the line, to William Carman, describes this line as running north seventy-nine degrees west, to *low water mark* on the river Delaware. The defendant, Browning, derives his title from this William Carman, who devised to him in trust for his children, who are the other defendants. It is clear by the proof, that this line has, for more than forty years, been recognized by the owners of the land on both sides of it, as the division line between them, to low water mark on the Delaware river.

By the common law, as it existed in New Jersey before 1851, the owners of lands on the margin of tide waters had certain rights and privileges to the water, and in the shore in front of his lands, although the title was in the state. By the statute known as the wharf act, approved March eighteenth, 1851, the right to reclaim the shore in front of his lands, and appropriate it to his own use, was vested in the shore owner. What were the lands *in front* of him, and what was the boundary upon the shore between coterminous shore owners, was not settled by that act. But where such coterminous shore owners, either before or since the passage of the wharf act, had fixed the boundary of their rights upon the shore, by deeds or other instruments that would have bound them if their inchoate rights had been complete and perfect, they must, upon plain principles of

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law, he held to the boundary so fixed, when their right becomes complete and perfect. They should then be held to be estopped from denying the division line to be the line so fixed.

I think that persons who have for years recognized and acquiesced in a line as separating their inchoate and imperfect rights upon the shore, should be held bound by such acknowledgment and acquiescence, for the same reason that they are held to be bound by them as to lines on upland. This seems to be the ground of the decision in the case of *O'Donnell v. Kelsey*, 6 *Seld.* 412, and 4 *Sandf. S. C.* 202.

But if such acquiescence and recognition have no force to settle the boundary, and recourse is had to any of the rules adopted elsewhere in such cases, which are very unsettled, the complainants' rights in the shore will, by some, be extended south of the line claimed, and will by none of them come short of it. If we adopt the rule in *Rust v. The Boston Mill Corporation*, 6 *Pick.* 158, approved in *Sparhawk v. Bullard*, 1 *Metc.* 98, and in *Deerfield v. Arms*, 17 *Pick.* 41, and mentioned with approval in *O'Donnell v. Kelsey*, the line on the shore would be much south of the ancient line extended. If we take as the rule, that laid down in Massachusetts in the more recent case of *Gray v. Deluce*, 5 *Cush.* 12, in which the shore line, to which it was applied, was very like that line in this case, still the line would, beyond question, diverge south of the ancient line. The rule in *Gray v. Deluce*, seems much more in accordance with sound principle and good sense, than that in *Rust v. The Boston Mill Corporation*. The rule of division adopted in Maine, in *Emerson v. Taylor*, 9 *Greenl.* 42, is so uncertain and impracticable, that it can never be adopted anywhere permanently, as the rule of division of the shore. It would always vary at any point on high water line, if either of the adjoining proprietors, before running the division line, should sell some of his shore front, or increase it by purchase. The Superior Court of New York, in *Nott v. Thayer*, 2 *Bosw.* 10, were much inclined to

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extend the partition line above high water mark, as the division line of the shore below it.

As the complainants apply for the injunction and relief only to the old partition line extended, and claim nothing south of it, I have no doubt but that their right to reclaim and improve the shore, extends to that line. The piles driven by the defendant, Browning, north of that line, are an injury to them, and an obstruction to the exercise of their rights. If the complainants permit them to remain, and Browning to go on with his improvements, they may be barred by acquiescence. They have no remedy at law; although they have a vested right or easement in these lands, they are not entitled to the exclusive possession until reclaimed or enclosed, and cannot sustain ejectment.

The complainants are entitled to have the ancient line extended, declared to be the division line upon the shore between them and the defendants, and established as such; and to have the defendants enjoined perpetually from placing piles or other obstructions on the shore in front of their lands north of that line.

KING vs. THE MORRIS AND ESSEX RAILROAD COMPANY.

1. The grant of a franchise to operate a railroad, does not confer the right to use upon it locomotives so constructed as to throw out burning coals that may set fire to buildings along the line. But the road must be operated with engines so constructed as to cause the least danger.

2. That a building was erected after a railroad was laid out and constructed, is no impediment to relief against any nuisance arising from operating the road. The owner of a lot does not lose the right of using it for any lawful purpose, by reason of any erection on adjoining property, or any use to which the same was put while the lot was vacant.

3. Where a nuisance is an injury to the property of an individual, a suit to restrain it may be brought in his name, although many others are injured in the same way by it; and it is not necessary to proceed in the name of the Attorney General. The proceeding must be in the name of

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the Attorney General, only in case of a public nuisance, which is a nuisance that interferes with the enjoyment of a public or common right.

4. When a defendant, who has been doing what amounts to a nuisance, disclaims the intention to continue it, and is proceeding with diligence to remove and abate it, the court will, if satisfied that the cause of complaint will be removed as speedily as practicable, refuse an injunction.

An order had been granted that the defendants show cause why an injunction should not issue against them, to restrain them from running on their railroad, any coal-burning engine not provided with such apparatus as would effectually prevent the communication of fire from it to the buildings of complainant, near the line of their road.

The case was argued upon the bill, answer, affidavits annexed, and depositions taken.

Mr. J. Whitehead and *Mr. McCarter*, for motion.

Mr. Vanatta and *Mr. C. Parker*, contra.

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It satisfactorily appears in the case that, since the defendants placed upon their road in November last, sixteen new coal-burning engines, fires have occurred very frequently along the line of their road, and especially near the sash and blind factory of the complainant, in the city of Newark; and that boxes loaded on a wagon, in the rear of his factory, were set on fire a few days before the bill was filed, in such manner that the inference is almost unavoidable, that the fire was caused by live coals blown from a locomotive of the defendants, over the complainant's buildings into the yard behind them. It is evident that since the use of coal-burning locomotives, fires have been much more frequent along the line of the road than before, when wood-burners only were used. The increase of fires has caused alarm along the line of the road, and insurance companies refuse to take risks along the road at the usual rates, and some refuse altogether.

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The case is a proper one for the interference of this court by injunction. The defendants must be restrained from running any coal engines on their road, if the consequences are necessarily such as are shown by the proof in this case. The position taken by their counsel, that the privilege of running locomotives upon their road having been granted by the legislature, the residents and the owners of property in the vicinity must suffer the consequences without relief, is not tenable. The legislature never intended to grant, and never did grant to them, the right to scatter fire and desolation along their line to the width over which an engine could be contrived or constructed to throw burning coals. Their right to use locomotives was granted only on the condition imposed by law upon the use of all privileges and property, that is, that they shall be so used as to do no unnecessary damage to others. If coal-burners cannot be used without such increase of danger as is shown in this case, it will be the duty of the company to abandon them and return to wood-burners.

Nor is the right of the complainant to relief, affected by the fact that the railroad was laid out and constructed before he erected his factory. No one has the right to erect near the land of another, any nuisance which will prevent the use of such land for any lawful purpose; else the construction of a railroad might destroy utterly the value of all adjoining lots in a city, or its suburbs, where the whole value of the lots is for building purposes.

Nor is it necessary that the injunction or relief in this case should be applied for in the name of the state, or the Attorney General. This is not a public nuisance, although it may injure a great many persons. The injury is to the individual property of each. The nuisance is public when it affects the rights enjoyed by citizens as part of the public; as the right of navigating a river, or traveling on a public highway; rights to which every citizen is entitled.

But before an injunction will be issued, the court must be satisfied that not only has injury been done in the past, but

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that the defendants intend to continue it ; and from the charges in the bill and affidavits, it seemed as if these defendants had determined to go on regardless of consequences. But the answer and proofs satisfactorily show that there never was any intentional or wanton disregard of the rights of the complainant, or other persons along the line of the road, by the company or its principal executive or ministerial officers. Their coal-burners were constructed by the best makers, and on plans that on many other roads had been a sufficient guard against fires ; and since they discovered that fires were caused by them, they have assiduously endeavored to contrive such appliances as will effectually prevent any extraordinary danger. There were some of their sixteen locomotives as originally constructed, those with the bonnet screen above the smoke-pipe, from which large pieces of ignited coal could by possibility be thrown by a strong application of the draft from the exhaust pipe. These engines may generally, and on most roads, be safe ; but when used on heavy trains, or steep grades, that require the whole power of the engine, the driver will naturally use the power placed at his disposal to overcome the difficulty, and put on the full draft, which would blow out the burning coals. The new apparatus which the defendants have placed upon nearly all their smoke-pipes, and which they intend in a few days to place upon all, will, in my opinion, obviate all the evils complained of. It may, however, still be possible that such sparks may escape as will cause fire, and the injunction asked for would be violated ; it should not, therefore, be granted in that form. And, on the whole, I am of opinion that, under the circumstances of this case, no injunction, however guarded, should issue. But as there was reason for the action of the complainant at the time of filing his bill, as the defendants were then running engines that seem to have been dangerous, and as the injunction is refused on account of the action of the defendants, chiefly since the filing of the bill, and of which it does not appear that the complainant was apprised, the costs on both sides must be paid

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by the defendants. On these conditions, let the complainant's bill be dismissed, without prejudice to his filing a new bill founded on past occurrences, if it appears that the cause of complaint shall not be remedied by the action of the defendants.

FORCE vs. DUTCHER and others.

1. An agreement denied by a responsive answer, must be proved by two witnesses, or proof equivalent to that. The complainant is not a competent witness, where any of the defendants are sued in a representative capacity.

2. In a contract to convey land, it is necessary that the lands to be conveyed should be described or designated in the written agreement.

3. An agent to sell lands, has not, merely as such, power to convey. He can bind his principal to convey, but cannot himself convey, unless authorized by a power of attorney, first duly acknowledged and recorded. Therefore a deed cannot be demanded of, or payment tendered to, a mere agent to sell.

4. A demand of a deed, and tender of payment, must be within a reasonable time. In this case, two years held not to be a reasonable time.

5. Part performance, to take a case out of the statute of frauds, must be clearly proved.

6. It is not necessary to set up in the pleadings, as a defence, the statute of frauds, unless the contract against which it is set up, is that on which the relief prayed for is founded.

7. A person making a contract to convey lands, verbal or written, and failing to perform it, is bound to refund the amount he may have received upon it, with interest.

Mr. Vanatta, for complainant.

Mr. E. W. Scudder, for defendant, Dutcher.

Mr. P. D. Vroom, for Hunt's executors.

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The bill alleges, that on the eleventh day of October, 1856, William E. Hunt, since deceased, by his agent, the defendant, Dutcher, agreed to sell to the complainant twenty-two acres of land in Mercer county, for the price of \$7000; that the agreement was by parol, but was for a lot, with specific boundaries, set out in the bill; that a note for \$1000 was taken in part payment, for which a receipt was given in these words: "Received, Trenton, October eleventh, 1856, of William M. Force, a note for \$1000, payable in sixty days, to apply on purchase money of twenty-two acres of land, on the easterly part of William E. Hunt's farm, south of the Sandtown road; purchase price of said land \$7000; deed to be ready within one week. Andrew Dutcher, attorney for William E. Hunt." That the complainant agreed to sell to Isaac Stephens, eleven acres of said tract for \$5000, and that, by his consent, the eleven acres were, on the twenty-fifth of October, 1856, conveyed to Stephens directly by Hunt, in part fulfillment of the contract; that Hunt received this \$5000, which left \$1000 of the contract price to be paid by complainant; that Hunt delayed making the conveyance, and that complainant, in December of the same year, formally demanded the conveyance of Dutcher, and tendered himself ready to pay the purchase money, but that Dutcher never procured the deed from Hunt or offered to deliver it; that after sundry negotiations relating to this eleven acres, in the month of April, 1859, Hunt, by his agent, Dutcher, agreed to sell to C. S. Green, a tract of thirty and seventeen one-hundredth acres, of which the eleven acres was part, for \$10,000; that complainant, hearing of this, interposed to prevent the sale, but upon being promised by Dutcher that he should be paid out of the proceeds for his eleven acres, at the rate of \$400 an acre, withdrew his opposition to the sale, which was completed on the twentieth of April, 1859; that, by this agreement and sale, Hunt and Dutcher were bound to account to him for \$4400, and to pay him \$3400, the excess above the \$1000 of the purchase

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money, which he had not paid. The bill is filed for a discovery and account, and the payment of the amount due; and also contains the general prayer for relief.

The answer of Dutcher admits the contract of sale by Hunt through him as agent, and the giving of the receipt, and that the note was given and paid; but denies that it was for the tract as described in the bill, and sets out boundaries, which essentially vary the tract sold. It admits the conveyance to Stephens, but alleges that only part of the eleven acres conveyed to him was portion of the twenty-two acre tract; that the residue was other lands of Hunt. It denies the promise alleged at the interview about the sale to Green, to pay \$400 an acre for the eleven acres, and says that nothing was said about the eleven acres, or \$400 per acre; but says that he, Dutcher, told the complainant he could not say how he would stand, but that he supposed Hunt would do what was right, and if complainant was entitled to anything beyond the money he had paid, he would get it.

The answer of Hunt's executors admits the contract for sale, and that they suppose it was for the lands described in the bill; it admits the conveyances to Stephens and to Green, and the receipt of the money in the deeds specified as the consideration. It answers that the executors are entirely ignorant as to the agreement alleged to have been made by Dutcher on the conveyance to Green, to pay the complainant \$400 per acre, for the eleven acres claimed by him.

The complainant's claim depends upon the promise made to him by Dutcher at the sale to Green, or upon the fact that he had an equitable title to eleven of the thirty acres conveyed to Green, and is entitled to a proper share of the purchase money; or else his claim is narrowed down to the recovery of his \$1000, which is not disputed.

The agreement at the sale to Green, is denied by Dutcher in his answer; on this point, it is responsive to the bill, and must be overcome by two witnesses. The only witness of-

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ferred to prove it, is the complainant himself. If the proof is competent, it is not sufficient.

The executors of Hunt deny all knowledge of such bargain or conversation at the sale to Green, and answer from their information and belief, that their testator sold the eleven acres as his own land. This puts the burthen of proving this bargain upon the complainant.

The only witness he offers to prove it, is himself. He was objected to when offered, and being a party, is by law incompetent, when the defendants are sued in a representative capacity.

The complainant then, cannot have relief against any of the defendants, on the bargain or promise at the sale to Green.

But if he had an equitable title to these eleven acres, and Hunt sold them and received the money, his executors may be called to account in a court of equity.

The contract to sell to Force, was a parol contract; the receipt, which is a written memorandum, signed by the agent of the party, does not describe or specify the lands; and as one material part of the contract is not in writing, it does not fulfill the requirements of the statute of frauds. This is the settled construction of that act. The answer of Dutcher denies that the tract described in complainant's bill, was the one that was sold. The answer of the executors says that they suppose it was the tract sold. This is not an admission such as will supply the requirements of the statute. In a suit in equity for specific performance, or at law for damages, the statute of frauds would have defeated the complainant. He never demanded a deed of Hunt, or tendered him the money due. A demand of Dutcher was of no validity; Dutcher was the agent to sell, not to convey. He could only be made such agent by a power of attorney, duly acknowledged and recorded. Such demand was not only required by the rules of law, but in this case, where the agent of Hunt for the sale of all his lands, was bargaining with the complainant for an advantage to himself, by putting some of the lands of his principal that he was entrusted to sell, into a

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common venture, for the joint benefit of himself and the complainant, equity would require a personal demand of Hunt.

Such demand, too, must be within a reasonable time, or specific performance will not be decreed. More than two years elapsed before the sale to Green, and no demand was made on Hunt. Under the circumstances of this case, that delay would have defeated a suit for specific performance. There was no part performance in this case to take it out of the statute. The conveyance to Stephens was to another person, and was upon a new arrangement and new covenants as to opening a street. It was not understood by Stephens to be in performance of the agreement with Force. That it was in part performance, is denied by Dutcher in his answer, and is not proved by sufficient evidence as against him, or by legal evidence as against the executors. And no specific performance of an agreement will be decreed on account of part performance, where this agreement is not certain and clearly proved. In this case, there is not sufficient proof that the agreement was for the lands described in the bill, and no specific performance could have been decreed.

The complainant, then, had no equitable title to the eleven acres of the land conveyed, and cannot recover on the ground that Hunt sold and conveyed the lands to which he was entitled, and should account for their proportion of the purchase money received.

The statute of frauds has not been pleaded in bar, nor set up as a defence in either answer. If the suit had been brought on the contract for specific performance, or in any way directly on the contract, and the agreement was admitted, the defendants could not take advantage of the statute of frauds, unless it was interposed as a defence. But here the bill is not filed upon the contract of October, 1856, but upon a contract made in April, 1859, at the sale to Green. That contract, if made by parol, as stated in the bill, was not within the statute of frauds, and it could not have been interposed as a plea or defence to it. But under the general prayer for relief, a complainant who fails in the relief specially prayed

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for, can have any other relief that he may be entitled to on the case set forth in the bill and proved by the evidence.

Such relief here depends upon the complainant showing an equitable title to these eleven acres sold to Green. And the proof shows that he had no such equitable title; the statute of frauds prevented it. No plea of the statute of frauds is necessary to bar such relief under the general prayer.

But William E. Hunt, when he conveyed the land to Green, in April, 1859, was bound to refund to the complainant the \$1000 paid to him at the making of the contract for sale, and that, with interest from the day on which the note was payable. The complainant is entitled to a decree to that effect. \$1125 was placed in Dutcher's hands, to be paid to the complainant on that account, at the sale to Green. Dutcher must be held liable to interest on that sum, from April twentieth, 1859. He did not tender it to the complainant in money, nor has he kept it in specie, or separated from his own money, for the complainant. To that extent the complainant is entitled to a decree, both against Dutcher and the executors, to be paid by the executors if it cannot be recovered from Dutcher. The residue of the amount must be paid by the executors. The complainant is entitled to costs against the defendants.

JOHNSON vs. DOUGHERTY and wife.*

1. Where one person purchases land for another, and with the money of the other, although he takes the title in his own name, a trust results to the person whose money is paid. So if a guardian, or other trustee, purchase with the money of the ward or *cestui que trust*, a trust results without being declared in writing.

2. Where a mother, a married woman, received money for her daughter, and declared that certain lands, purchased by and conveyed to her for about the amount so received, were purchased with that money and for her daughter, the lands will be decreed to be held in trust for the daughter.

* CITED in *Cutler v. Tuttle*, 4 C. E. Gr. 553; *Shaler v. Trowbridge* 1 Stew. 599, 602.

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3. If a man agree to convey lands, part of which belong to himself and part to his infant step-daughter, and receive a sum as part payment under that agreement, with which he purchases a mortgage that includes the infant's part, so as by foreclosure to give title, the mortgage will belong to him, and is not held in trust for the infant, the consideration for which the money was paid being the personal undertaking of the vendor, and not the property of the infant, which was in no wise affected by the contract.

Mr. Woodruff, for complainant.

Mr. A. S. Pennington, for defendants.

THE CHANCELLOR.

This suit is to foreclose a mortgage, given by Jacob R. Terhune and wife, to Martha Speer, for \$700, dated on the ninth day of April, 1853. It includes a lot of land in Bergen county, and two lots in Passaic county ; \$400 of the principal has been paid, and complainant seeks payment of the remaining \$300, with interest. The mortgage was assigned by Martha Speer to Daniel Depew, on the tenth day of May, 1854, and was by him assigned to the complainants, in September, 1860. It is admitted that the mortgage, while held by Depew, was a valid and subsisting encumbrance on the property. Jacob R. Terhune and his wife, on the tenth day of May, 1854, conveyed the mortgaged premises and one other lot, to Letitia Johnson, the wife of the complainant, who died on the fourth day of February, 1859, leaving the defendant, Catharine Jane Dougherty, her daughter, her only issue and her heir-at-law. She was then seventeen years old, and afterwards married the defendant, James Dougherty.

After the purchase from Terhune, Johnson and his wife purchased two other lots, adjoining the first lot in the deed, from Terhune, being together the half acre excepted in that deed ; one of these two lots was conveyed to him and his wife, and the other to his wife. On the thirteenth of September, 1860, Johnson, by a written contract, agreed to convey to Abraham Coe, the first tract in the deed from Terhune, and the half acre excepted out of it in that deed and conveyed

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by the two subsequent deeds. The price was to be \$1300, of which \$300 was paid in cash ; the residue was to be paid on the delivery of the deed, which was to be on or before December, 1864 ; Coe, in the meantime, to occupy the property and pay \$70 yearly rent for it.

With the \$300 paid by Coe, Johnson purchased the mortgage held by Depew, and had the same assigned to him so as to have it foreclosed, and by a sale of the property, to give title to Coe ; which could not otherwise be done, as the defendant, Catharine Jane, was a minor.

The defendants allege that the property conveyed by Terhune was purchased and paid for by money of the defendant, Catharine Jane, held by her mother, and was expressly bought and intended for her, and that it was, in consequence thereof, held in trust for her, free from any curtesy or interest of Johnson ; and that when Johnson sold, or undertook to sell the same to Coe, the purchase money belonged to her, and when he paid Depew for this mortgage \$300 received from Coe, the mortgage was satisfied or held in trust for her.

The consideration of the conveyance from Terhune was \$1000 or \$1025. Of this, \$300 was left in the mortgage, which was by payments, on the day of the conveyance, reduced to \$300, and transferred to Depew ; \$700 or \$725 was paid in money. It appears satisfactorily, by the weight of evidence, that Letitia Johnson had in her hands about \$700 of money belonging to her daughter, which she desired and intended to invest in this property, for the benefit of her daughter. It is proved, and not disputed, that she recovered and received upwards of \$700 in a suit brought by her as next friend, in her daughter's name, in New York, for damages to her real estate in that state ; and that she had several hundred dollars of the personal estate of Stephen Christopher, her first husband, and the father of Catharine Jane, to which Catharine Jane was entitled ; and it is fair to presume that the money advanced for the expenses of that suit was intended to be advanced out of this money. The amount recovered is clearly proved by the attorney, who prosecuted

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the suit, and collected the greater part of it. The only evidence on the other side is that of the complainant, who is so clearly shown to be mistaken in the most material parts of his account of what became of this money, as to deprive his testimony of all its weight.

The repeated declarations of his wife, at or about the time of the purchase, that this was bought with the \$700 of her daughter, and was intended for her, are already proved, and are in harmony with the attending facts and circumstances.

It is a settled principle, that when one person purchases property for a stranger, and the purchase money is paid by the stranger, or out of his funds, although the title is taken in the name of the person making the purchase, a trust results, and the land is held in trust for the party whose money paid for it. So, if a guardian or other trustee purchase with the money of his ward or other *cestui que trust*, a trust results by operation of law. This trust arises without any declaration in writing, for it is expressly excepted by the statute of frauds, from the operation of that statute; and the facts necessary to constitute such trust can be proved by parol, even if denied by the answer. *Hill on Trustees*, 91-2, and *notes*, and 95; *Depeyster v. Gould*, 2 *Green's C. R.* 480.

In this case, the lands conveyed to Letitia Johnson by Jacob R. Terhune and wife, by their deed of May tenth, 1853, must be taken to have been held by her in trust for her daughter, Catharine Jane, with whose money, and for whose benefit, the same was purchased. But this does not dispose of the main question in this cause. The mortgage was in Depew's hands, a valid security. It was bought by Johnson that he might foreclose it; not to pay it off. He bought it with money that was his own, and to which the defendants had no claim. The money was paid to him by Coe, as the consideration of his agreement to convey the property. Coe got no title, but only Johnson's personal obligation to give title. Johnson, if he does not convey title, will be personally liable to pay this money back; it is no

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lien on the property of the defendants. The lot conveyed to Johnson and his wife by Mrs. Terhune and her heirs, for which he paid \$324, is included in the sale to Coe; and of this, the fee was vested in Johnson solely, by the death of his wife. Such is the effect of a conveyance to husband and wife jointly.

The complainant is entitled to a decree for the sale of the mortgaged premises. The defendant, Catharine Jane Dougherty, will be entitled to any surplus of the proceeds of such sale, above the mortgage debt and costs.

A decree must be made accordingly.

THE ATTORNEY GENERAL ex rel. HOLTZ and others vs.
HEISHON.*

1. A charter, giving power to a municipal corporation to ascertain and establish the boundaries of streets, does not thereby give to it power to authorize buildings to be erected within the boundaries of an established street or highway.

2. The remedy at law by indictment, is adequate to remove an encroachment on a public street by erecting a building extending into it. The courts of law are the proper tribunals to settle the fact of encroachment. For such cases, a court of equity will not interfere by injunction, unless under peculiar circumstances of pressing irreparable injury.

Mr. S. A. Allen, for relators.

THE CHANCELLOR.

The information is filed to restrain the erection of a building on the north side of Broadway street, in the city of Salem, alleged to project into the street, and to compel the abatement of the part already built. Upon the coming in of the answer the preliminary injunction was dissolved, and the building has been finished. The decree asked for now

* CITED in *Att'y Gen. v. Brown*, 9 C. E. Gr. 92; *Att'y Gen. v. Del. & B. B. R. Co.*, 12 C. E. Gr. 25, 26.

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is, to compel the building to be taken down, so far as it projects into the street.

The Mayor and Common Council of Salem have, by the eighth section of their charter, power, by ordinance, to ascertain and establish the boundaries of all streets in said city, and prevent and remove all encroachments upon said streets. And, by the supplement to their charter, passed in 1860, they have power to appoint commissioners "to lay out, open, widen, alter, and vacate any street in said city."

In September, 1864, they passed an ordinance to fix a line for buildings on the north side of Broadway street, between Star Hall corner and Penn street, which is the place where this building is erected. That ordinance fixed the line twenty feet north of the curb stone, as then laid, and provided that no building should be erected nearer said curb than twenty feet. No means had been taken to ascertain the true line of the street, nor did the ordinance profess to ascertain or establish it; nor had commissioners been appointed to alter the street. Nor did the ordinance give permission to build up to that line.

The defendant, Heishon, placed the front of his building on the line so fixed as the line for buildings.

The Mayor and Common Council, while they have power to ascertain and establish the line of a street, and to alter a street, by pursuing the provisions of their charter, have no power to authorize any one to build within a street, to a line arbitrarily fixed by them. The ordinance fixing a line for buildings is no defence to Heishon, if his building is within the line of the street.

The answer denies that the building is erected within the line of the street. This is the point at issue in the case, and upon which the evidence has been taken by the relators. The relators contend that the building projects fifteen inches into the street at one extremity of the front, and eleven inches at the other. It projects this distance beyond the line of part of the adjoining building of one of the relators, and the line of the front of the building pulled down for its erection,

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and which had stood there for more than twenty years. The street had been open to the line of the old building, and the sidewalk paved up to it. It had been open to that line, according to the testimony and recollection of some of the oldest inhabitants, for more than fifty years, and they had considered that line the line of the street. The street was reputed to be one hundred feet wide, and this building encroached upon that width, if the buildings supposed to be landmarks on the other side, were on the true line. The front of the old Star Hall corner, a building which has stood for almost one hundred years on the adjoining lot, and which many old inhabitants suppose to be on the line of the street, is on the line contended for by the relators. These facts are strong to induce me to believe that the true north line of Broadway street is where the relators contend, and that Heishon's building projects into the street.

But, on the other hand, there is no record or survey of the laying out of this street, and no proof of its width. There is no evidence to show that any competent authority has recognized the relators' line as the north side of Broadway. It was open and paved to that line, but there is no proof that the public authorities worked the street up to that line. Any one, for his own convenience, may let a portion of his land, contiguous to the street, lie open; but unless he permits the public to use and work it as part of the street, it is not conclusive proof of dedication, nor will permissive use for twenty years, in all cases, give a right by prescription.

In this case, the answer denies that this building is within the line of the street, and the municipal authorities have treated the line on which Heishon has built, as the line of the street.

This court has, no doubt, power to cause nuisances to be removed and abated; nuisances to individuals, on bill, and public nuisances, like this, on information. But it will only exercise that power when the fact of nuisance is beyond doubt, or has been settled by a verdict at law. And where

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the nuisance is erected and complete, this court should not interfere without a trial at law, except, perhaps, in cases of irreparable mischief from its continuance, especially when there is a full and complete remedy at law. 2 *Story's Eq. Jur.*, § 924 a; *Attorney General v. N. J. R. R. Co.*, 2 *Green's C. R.* 140; *Attorney General v. Hudson R. R. Co.*, 1 *Stockt.* 560; *Allen v. Monmouth Freeholders*, 2 *Beas.* 75.

There is in this case, a full and complete remedy at law for the public, by indictment.

The case of *Smith v. The State*, 3 *Zab.* 130, is like this. There, Smith was indicted for a like encroachment upon Broadway, in the city of Paterson, and was convicted upon evidence much like that now produced. A writ issued to the sheriff, on the affirmance in the Supreme Court, to abate the nuisance by removing the building at the expense of the defendant. The facts in dispute, in this case, should be determined by a jury; and if the bill is retained, an issue should be directed, to try the question whether Heishon's building extends beyond the true line of the street.

This is not like the case of a nuisance to the public health, or a nuisance obstructing and delaying public travel on important highways, in which the injury during the proceedings at law would be great and irreparable. The injury to the public, by being shut out from using one foot of a street one hundred feet wide, or to the relators by being deprived of a prospect to that extent, is not of a nature that requires the extraordinary powers of this court to be exercised, when the remedy at law is adequate, but not quite so speedy.

The bill must be dismissed, unless the relators should elect to apply for an issue to try the fact.

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CHAPMAN vs. HUNT and others.

COMPTON vs. HUNT and others.

Two mortgages, given to secure four notes, and to indemnify an endorser, were held to be paid and satisfied ; the payment being denied by the person holding them, on oath, and testified to by the assignee of the mortgagor, who paid them, and shown by the written surrender and receipt of the holder.

Mr. G. M. Chapman, pro se.

Mr. D. Hayes, for Mrs. Compton.

Mr. Keasbey, for defendants, I. L. Hunt, Fairchild, and Allen.

THE CHANCELLOR.

These suits are for different objects, and relate to different property. They are both foreclosure suits, and have been argued together, because the main contest in both, is on the same point ; that is, whether four notes of Isaac L. Hunt to Samuel J. Hunt, amounting to \$5956.67, are paid. The first of the two chattel mortgages, which Chapman's suit seeks to foreclose, is for the payment of these notes, and also to indemnify S. J. Hunt against endorsements on Isaac's notes, then made. And the mortgage, claimed to be held by Chapman as defendant in Mrs. Compton's suit, on a farm at Rahway, is to secure the payment of these same notes, and to indemnify S. J. Hunt against endorsements then made, and endorsements to be made. Mrs. Compton's own mortgage for \$7200 is not disputed ; the defendants, Fairchild and Allen, as was their duty, offered to pay it upon her assigning it to them ; but she preferred to hold it, and share the litigation, until the contest between the defendants as to the second mortgage was decided.

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The chattel mortgage from I. L. Hunt to S. J. Hunt, which Chapman's bill seeks to foreclose, is dated September 27th, 1859. Its condition is as above stated ; and the chattels mortgaged were the household furniture and wearing apparel of I. L. Hunt, and his stock, farming utensils, hay, grain, crops, horses, and carriages, then on his farm at Rahway. After the giving of this mortgage, and on the fourteenth day of November, 1859, Isaac L. Hunt, who was engaged in mercantile business in New York, made an assignment of all his property, except that situate in New Jersey, to Samuel J. Hunt, of New York, for the benefit of his creditors. This assignment was in trust, to pay, first, the debts mentioned in Schedule A, annexed, amounting to about \$48,000. This schedule included the four notes secured by the two mortgages, and all notes, so far as appears by the evidence, that S. J. Hunt had endorsed for I. L. Hunt. This assignment was valid by the laws of New York, where the property assigned was situate. After the assignee had proceeded to sell part of the property assigned, and to make payments on the debts, an arrangement was made between him and G. M. Chapman, on the tenth day of March, 1860, by which he was to assign over the whole estate of Isaac L. Hunt assigned to him, unto Chapman ; Chapman undertaking to purchase all the debts due from I. L. Hunt to S. J. Hunt, and pay for them by his ten promissory notes ; to purchase, or procure releases from, all the claims in Schedules A and B, annexed to the assignment ; and to produce releases, or agreements of compromise, from all other creditors of I. L. Hunt. This agreement was made by the consent of I. L. Hunt, who entered into an agreement of the same date, with Chapman, by which Chapman was to purchase or settle all the outstanding claims in Schedule A and B, and hold them at the price paid for them. I. L. Hunt himself was to settle all other claims against him. For this, I. L. Hunt agreed to require S. J. Hunt to transfer to Chapman all the property assigned to him ; and also, the chattel mortgage on the furniture, stock, and farming utensils, and chattel mortgage on stock and

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tools at I. L. Hunt's malleable iron factory, in Newark. And further, I. L. Hunt did thereby "sell, assign, transfer, set over, and assign, to said Chapman, all the right, title, and interest, of him, the said Isaac, in the property covered by said assignment, and all his residuary interest under the same, or in the same, or to the property covered thereby, and all his property, real and personal, whether in the state of New Jersey, or elsewhere," excepting the household furniture, farming utensils, stock, grain, and hay, on his farm at Rahway. This property was to be sold to pay, first, Chapman's advances for Isaac, and the sum of \$31,865.18, acknowledged to be due to Chapman; and out of the balance, if any, secondly, to pay book accounts outstanding against the factory of Isaac, at Newark, to the amount of \$3000; thirdly, to pay the notes given, or to be given by Isaac, in compromising his debts not in said schedules, and such debts as Isaac might not be able to compromise. And the surplus then remaining, should belong equally to Isaac and Chapman.

Samuel J. Hunt, on the twenty-second day of September, 1860, executed assignments to Chapman, of the chattel mortgage to him, and of the mortgage on the farm, but did not deliver to him the four notes for \$5956.67, mentioned in them. And he testifies that nothing was due on this mortgage, or the farm mortgage, at the assignment, and that he told Chapman so.

The defendant, I. L. Hunt, contends that these notes are paid; first, by his assigning to S. J. Hunt sufficient property to pay them, and all the claims mentioned in Schedule A, which were to be paid first. It appears that the property assigned was sufficient for that purpose. But by the two agreements of March tenth, 1860, Chapman was to purchase these notes, and to hold them as his own, and he did give in payment of them his own ten notes, mentioned in Exhibit M 7, for defendants, which notes he afterwards paid. This actual purchase transferred the property in these four notes to Chapman, on the tenth of March, 1860, when S. J. Hunt

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made an assignment, in writing, to him, of all his claims against I. L. Hunt; this is in Exhibit M 7.

But after this, S. J. Hunt transferred to Chapman the unsold balance of the goods assigned to him, amounting to \$22,741.63, and the cash and bills receivable that he had taken for the part sold, amounting to about \$25,000 more; and Chapman surrendered to him the claim he had assigned to Chapman on account of these notes and other claims against Isaac L. Hunt. S. J. Hunt testifies to this, and that it was in pursuance of their understanding. Chapman, in his testimony, denies it. But it is proved by documents offered in evidence, which not only show, but constitute the surrender. The genuineness of these documents is not disputed. One of them is Exhibit M 7, for defendants. It is written under the instrument by which the claims of S. J. Hunt against I. L. Hunt were transferred to Chapman, and this instrument constituted his title to those claims, including these notes. The surrender is in these words, "March twentieth, 1860. I hereby surrender the above claim to Samuel J. Hunt, assignee of Isaac L. Hunt, to be canceled as against his estate. G. M. Chapman." Again, Exhibit M 8, for defendants, of the same date, acknowledges the receipt of \$15,461.16 from S. J. Hunt, as assignee, on account of claims of S. J. Hunt, preferred in the assignment in Schedule A, which claims he, Chapman, had purchased of S. J. Hunt on the tenth of that month, and had that day surrendered to the assignee in liquidation of that amount.

There can be no doubt about the effect of this payment. Chapman held this claim, including these four notes. S. J. Hunt was assignee, and had these funds; they were funds that he was bound to pay over on these and other claims in Schedule A. Chapman held the claim, accepted the payment, and surrendered the claim. These notes were understandingly and designedly paid off, and surrendered; there was no mistake or fraud in the matter; and these instruments, if not impeached, themselves discharge these notes.

Besides the payment of these notes, the condition of the

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mortgage provides that S. J. Hunt shall be indemnified from all endorsements made for I. L. Hunt. It would be enough upon this point to say that the bill does not allege that I. L. Hunt omitted to pay any such notes, and that S. J. Hunt, or Chapman, had to pay them. But from the evidence, it appears that these notes were all paid, and paid by funds provided by Isaac, and that neither Samuel nor Chapman paid them out of their own funds, or have suffered any loss by reason of those endorsements. Most of these notes are included in the claim assigned and surrendered, in Exhibit M 7, for defendants. These were all paid by Isaac's money. The rest are mentioned in Exhibit C, No. 11, for complainants; these were not surrendered or assigned in Exhibit M 7. They were simply paid with money, the proceeds of the property assigned. This appears in the evidence of Samuel J. Hunt, in answers to questions twenty-six and twenty-seven, and is to be gathered as a legal inference from the fact, that the amount realized from the property assigned for the purpose of paying these claims, which were included in Schedule A, was sufficient to pay them. By Exhibit M 7, it appears that Hunt, on February twentieth, 1860, had received, as a dividend on his claims, \$9762. The amount of the proceeds of the stock handed over to Chapman is stated by him, in his testimony, at \$22,780.20; and the amount of cash received and paid over by S. J. Hunt, is stated by him, in answer to question seventeen, at \$25,000. This last amount, the complainant, in his brief, I do not know on what authority, states as \$23,000. But whichever it may be, these three sums are far more than sufficient to pay all the debts in Schedule A. And as Isaac has furnished the funds with which to pay them, they must be considered as paid with his money, and that nothing is due on the mortgage on account of these notes, not included in the surrender of March twentieth, 1860.

In the Chapman suit, a foreclosure is also prayed on another instrument, styled a chattel mortgage, made by Isaac L. Hunt to George M. Chapman, dated on the twenty-fifth

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day of October, 1860, by which I. L. Hunt sells, assigns, transfers, and sets over, his interest in the firm of I. L. Hunt & Co., consisting of himself and Julia Ann Chapman; and also all his interest in the grain, corn, hay, buckwheat, wheat, timber, cornstalks, fencing materials, and crops of every nature, on his farm at Rahway, and all his right to the chattels set forth in the schedule to the chattel mortgage, to S. J. Hunt; also all his tools and chattels of the Newark Malleable Iron Factory, with full power to sell the same, and out of the proceeds to pay: first, to himself, any moneys that may be justly due to him; second, to pay said Julia Ann Chapman any moneys that may be due to her; third, to pay any moneys remaining, according to I. L. Hunt's written directions, *pro rata*, among his creditors.

This instrument, although not in form a mortgage, is such in effect; and this court will give relief on it by ordering a sale. The complainant is entitled to have an account taken of what is due to him on debts owing to him by I. L. Hunt, at the date of this instrument, and of what was due to the complainant, Julia Ann Chapman, at that date; and to have the personal property included in that assignment, sold for the payment of these moneys, in the order specified in it.

In the Compton suit, of course there must be a decree for the complainant. The mortgage on the farm to Samuel J. Hunt, assigned to Chapman, must be held to be satisfied, for the same reason that the chattel mortgage of the same date is herein above adjudged to be satisfied. The four notes, the payment of which it was made to secure, are paid and surrendered, and neither S. J. Hunt nor Compton has been called upon to pay the endorsed notes for which it provided an indemnity; these notes were all actually paid out of other property of Isaac, assigned by him for that purpose. The agreement of March tenth, 1860, so far as it assigns or conveys the property of Isaac, is a preferential assignment, and was no doubt intended and made to keep off the creditors, who were not preferred; and it must, therefore, for the reason stated by Chancellor Green, in *Fairchild and Allen v.*

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Chapman, 1 *McCarter* 367, be held void, so far as it relates to property in New Jersey ; and, therefore, void for the purposes for which it is set up here. This view taken of the two mortgages to S. J. Hunt, makes it unnecessary to consider the question whether the assignments of them are not void for the interlineation in each, after execution and delivery. And the question whether the farm mortgage to S. J. Hunt can be set up by Chapman, cannot be determined in this suit, it having been assigned by him to his mother, Eunice, and not re-assigned to him by her executors.

An account must be taken of the amount due to the complainant on her mortgage, and to the defendants, Allen, Parker, and Fairchild, on their judgments, and the property sold to pay these encumbrances in their order ; and the surplus, if any, paid to Allen, as owner of the equity of redemption.

HARRISON'S ADMINISTRATRIX vs. JOHNSON and others.*

1. The evidence of a defendant who has no interest in the event of the suit, and is unnecessarily made a party, is competent, though the complainant sue in a representative capacity.

2. When the owner of property produces a mortgage made by him upon that property, with the seals torn off, and gives it to a party about purchasing the property, stating that it was paid and satisfied, and that he could take it and have it canceled of record, the fact that the mortgage has no receipt of payment endorsed upon it, and that the bond is not produced, is not sufficient to put the purchaser upon further inquiry.

3. The fact that there is no receipt by the mortgagee or his executors, &c., upon a mortgage presented to the clerk for cancellation, does not make its cancellation illegal, though such cancellation is not *conclusive* evidence of its payment. Its production with the seals torn off, is sufficient authority to the clerk where there is nothing to arouse his suspicions.

4. A mortgage, canceled upon the record, will not be revived against a *bona fide* purchaser of the property, for full value, and without notice in law or in fact, that it was a subsisting encumbrance at the time he purchased.

5. The cases examined and commented upon.

* CITED in *Dudley v. Bergen*, 8 C. E. Gr. 400.

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This cause was argued before James Wilson, esq., one of the masters of the court, who was called by the Chancellor to hear the same.

Mr. P. Bentley and *Mr. I. W. Scudder*, for complainant.

Mr. J. P. Jackson, *Mr. A. S. Hubbell*, and *Mr. J. P. Bradley*, for defendants.

THE MASTER.

By an agreement in writing, dated fifth of March, 1850, Thomas P. Johnson, one of the defendants, agreed to sell to Joseph Harrison seven eighths of certain lots of land in Newark, for \$2848 ; the deed to be delivered on or before the first of May, in the same year ; the sum of \$37.50 to be paid on the delivery of the deed, and the residue to be secured by a mortgage upon those lots, and also upon certain other land, which, by an agreement of the same date, said Harrison agreed to sell to said Johnson. By the agreement first mentioned, Harrison also agreed that he would endeavor to get the title to the remaining one eighth of said lots, as soon as he could lawfully do so.

The deed was not delivered within the time so agreed on. But afterwards, by a deed dated twenty-first of November, 1853, said Joseph Harrison, together with James and George Harrison, conveyed to Johnson seven eighths of said lots ; and Johnson thereupon executed to Joseph Harrison a bond of the same date, for \$4500 ; and, in order to secure it, executed a mortgage to said Joseph upon a part of the property so conveyed. This mortgage is of the same date as the deed, and was, on sixth December, 1853, acknowledged, and left in the clerk's office to be recorded. On the same day, another agreement in writing was made between said Joseph Harrison and said Johnson, whereby, after referring to the agreement first above mentioned, and after reciting that said Harrison had not yet perfected the title to said one eighth of the property, either in himself or Johnson, and

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that said deed had been executed for seven eighths thereof to Johnson, and that he had paid, and secured to be paid, the consideration money for the whole of the property, and that Joseph Harrison desired Johnson to pay the whole of said purchase money to him, for his own use, and that of said James and George, it was agreed by said Joseph, that he would save harmless, and indemnify Johnson from all loss, damage, cost, and expense that he might be put to, by reason of said Joseph not procuring a good title to Johnson, for said one eighth, and from any damage, injury, expense, or loss which Johnson might be put to by reason of any improvements he might put thereon; and that he, Joseph, would, at his own cost and expense, within two years from that date, procure for said Johnson a good title to the whole of the lots mentioned in said deed. At the foot of this last agreement is another agreement, signed by Johnson, to the effect, that if Harrison did not make a good title within two years, he should refund to Johnson \$356, with interest from first of February, 1850, as liquidated damages.

Johnson took possession of said lots, and made extensive improvements on them, at an expense of about \$10,000. He afterwards mortgaged them to Mrs. Woodruff for \$10,000, and her mortgage was duly recorded. After this, he agreed to sell the property to Joseph F. Rusling, for \$17,000. Before Rusling obtained his deed for the property, he agreed to sell it to the New Jersey Railroad and Transportation Company, and A. S. Hubbell, esq., assisted in examining the title papers, as counsel for Mr. Rusling and the company. Mr. Hubbell searched the record of mortgages in the county clerk's office, in order to ascertain what encumbrances there were upon the property. He there found the record of the mortgage above mentioned, given by Johnson to Harrison. After this, and early in March, 1857, (Mr. Hubbell says it was from the fifth to the seventh, and his impression is that it was on the sixth,) the parties met at the house of Mr. Johnson, who was, at the time, an invalid, and unable to go out, and could speak but little, and only in a whisper.

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There were then present, Mr. Johnson, and Mr. Grover, his counsel, Mr. Rusling, and Mr. Hubbell. The mortgage which Johnson had given to Harrison, and which, in his search, Mr. Hubbell had found upon record, was then spoken of; Johnson then produced it, with the seals torn off, and handed it to Rusling, and both Johnson and Grover stated that it had been paid and satisfied. Mr. Hubbell also examined it, and was also told by Johnson and Grover that it was all right, and that he might take it to the clerk's office and have it canceled and discharged of record. Mr. Hubbell, thereupon, advised Mr. Rusling that he might safely take the deed and pay for the property, according to the agreement of purchase. Rusling, accordingly, accepted the deed from Johnson, and paid him \$4500 of the purchase money, and executed to him a mortgage for \$2500, payable when the title to the one eighth should be perfected. Rusling bought, subject to the mortgage for \$10,000, given to Mrs. Woodruff. The deed so given by Johnson to Rusling, contains a covenant of warranty of title, and other covenants. Mr. Rusling and Mr. Hubbell then went, on the same day, to the clerk's office, and produced to him the mortgage, with the seals torn off, and, at their request, the clerk canceled it of record. At the same time, Mr. Rusling left the deed with the clerk to be recorded. Mr. Rusling conveyed the property to the company for \$17,000, by deed dated sixth of March, 1857, which was recorded the next day. This deed is a deed of quit claim, without covenant of warranty of title. The company at once took possession of the property, and have held it ever since, and have made valuable improvements upon it. Mr. Rusling and Mr. Hubbell both testify that they had no suspicion at the time, but that the mortgage from Johnson to Harrison had been fully paid and satisfied.

On the twenty-fifth of April, 1857, Johnson executed an assignment of the \$2500 mortgage, so given to him by Rusling, to the complainant, and caused the assignment to be recorded; but the complainant, in his bill, charges, that this was done

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without his knowledge or consent, and says that he is willing to cancel that mortgage of record, upon receiving payment of the \$4500 mortgage, given by Johnson to Joseph Harrison.

The bill in this cause was filed September third, 1861, by James Harrison, as executor of said Joseph Harrison, who died in February, 1855; and said James, having died after this suit was commenced, it was revived in the name of Mary Harrison, as administratrix. The bill seeks to have the mortgage given by Johnson to Harrison, and which was canceled as above stated, foreclosed; and the mortgaged premises, which are now owned by the railroad company, sold to satisfy the debt, deducting, however, the said sum of \$356, with interest. It charges that the bond, which the mortgage was given to secure, has never been paid, and that the whole amount of principal and interest is due; that the mortgage which had been left in the clerk's office to be recorded, remained there until the second of April, 1856, when the clerk, without authority or right, delivered it to Johnson, who kept it in his possession until the sixth of March following, when he gave it up to Mr. Hubbell, to be canceled of record; that such cancellation of record was illegal, and of no effect, as against the complainant, and that Rusling and the company have no right to claim any exemption from the force and effect of the mortgage. The complainant tenders himself ready and willing to execute to the railroad company, a good title to the said one eighth of the property, which he says he is now able to do.

The company, by their answer, admit the execution of the mortgage so executed by Johnson to Harrison. They say that they purchased the property in good faith, and for a full consideration, which they have paid; that they believed at the time, that the mortgage had been fully paid and satisfied; that they caused the record of mortgages to be examined, and there found this mortgage uncanceled of record, but that, at the time of the delivery of the deed by Johnson to Rusling, (of whom, by previous arrangement, they had agreed to buy the property when he got it of Johnson,) he, Johnson, pro-

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duced the mortgage with the seals torn off, stating, at the same time, that it was paid and satisfied, and that he then gave it up to be canceled of record; that Rusling believed Johnson, and accepted the deed from him, and paid the consideration as agreed on, in the full belief that the mortgage was satisfied, and that Mr. Hubbell, (whom the company say was acting for them as well as for Rusling,) acted under the same belief; that in making their purchase, the company used all reasonable care and diligence to ascertain the condition of the property as to title and encumbrances; and that, having done so, and given full value for it, the mortgage ought not now be declared to be a lien upon the property.

The defendant, Johnson, was examined as a witness on the part of the company, under an order of the court for that purpose, subject, however, to all just exceptions. And upon the hearing, his testimony was objected to, upon the ground that he was an incompetent witness; that, being a defendant, he could not, it was insisted, be a witness, because the complainant is suing in a representative capacity, and that, under the act of the eighteenth of March, 1859, (*Nix. Dig.* 928,*) a party in a suit cannot be sworn as a witness, when the opposite party is prohibited by any legal disability, from being sworn as a witness, or either party sues or is sued, in a representative capacity. Johnson had parted with all his interest in the mortgaged premises, by the conveyance to Rusling, long before this suit was brought. He has no interest in the event of this suit. He is not a necessary party. *Vreeland v. Loubat*, 1 *Green's C. R.* 104. If he had not been made a defendant, there would be no objection to his competency. The complainant cannot, by making him a defendant, when he is not a necessary party, deprive the other defendants of the benefit of his testimony. Before the statute just referred to was enacted, it was according to the practice of this court, to permit a defendant to examine his co-defendant, upon an allegation that he was not interested in the event of the suit, or in the matter upon which he was to be examined; saving, however, all just exceptions. *Murray v. Shadwell*, 2 *Ves. &*

* *Rev.*, p. 378, sec. 3.

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B. 401; *Kirk v. Hodgson*, 2 *Johns. C. R.* 550; *Neville v. Demeritt*, 1 *Green's C. R.* 333. In such case, an objection to his testimony might be raised at the hearing, and if it then appeared that he was interested, it was rejected; otherwise, it was admitted. If this case had occurred before the statute, and Johnson had been examined under such order, his testimony would have been received at the hearing, for he is in no wise interested in the event of the suit. The statute was not designed to affect that rule of practice. If Johnson were interested in the event of the suit, then, as the complainant was suing in a representative capacity, he, Johnson, could not, under the statute, be sworn as a witness. But such is not the case. I receive his testimony, therefore, as that of a competent witness. The same objection was made to the testimony of Mr. Hubbell, who is also made a defendant. For like reasons, I think that he is a competent witness, and receive his testimony accordingly.

It was insisted by the complainant's counsel, that inasmuch as it appeared by a book kept in the clerk's office, called "the tickler," that the mortgage, after it was left there to be recorded, had been delivered by the clerk to Johnson, who was the mortgagor; and inasmuch as it did not appear that there was any receipt of payment endorsed on the mortgage, when Johnson produced it to Rusling and Hubbell with the seals torn off, and delivered it to them to be canceled of record, and he did not produce the bond which the mortgage was intended to secure, that these facts were sufficient to raise in their minds a doubt or suspicion, whether it had been paid or not; and that there was enough to put them upon inquiry, and that they ought to have made inquiry of the mortgagee, or his legal representatives, whether it had in fact been paid or not.

But, according to the evidence, "the tickler" is not one of the public records; not a book authorized or required to be kept by law; but only a private book of the clerk, kept for his own satisfaction and convenience. Hr. Hubbell was not bound to examine it in making his searches touching the

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property, and there is no evidence that he did examine it in fact, or that he knew what it contained, or even that he knew that such a book was in existence. I do not think that he can be considered as knowing, or as being bound to inform himself of, what it contained. He searched the registry of mortgages, which the law requires to be kept. He found there an entry of the mortgage in question, standing open and uncanceled. He then went with Rusling to Johnson's house to examine the title papers, preparatory to Rusling's taking his deed; and there Johnson produced the mortgage, with the seals torn off, and gave it to them, stating that it was paid and satisfied, and that they could take it and have it canceled, and discharged of record. If the mortgage had in fact been paid and satisfied, it would naturally and properly, and according to the usual course of such transactions, have been found in the custody of Johnson, who was not only the mortgagor, but still continued to be the owner of the mortgaged premises. And I do not think that the fact that the mortgage had no receipt of payment endorsed upon it, and that the bond was not produced, was one which ought to be taken as sufficient to raise a doubt or suspicion whether it had in fact been paid, in the minds of Mr. Hubbell and Mr. Rusling, or to put them upon further inquiry. There is no rule of law requiring such receipt to be endorsed upon a mortgage, when it is paid or satisfied; and in practice, so far as I am acquainted with it, and as stated by counsel on the argument, as within their own knowledge, a mortgage is often, when fully paid, canceled by tearing off the seals, and is then given up to the mortgagor without any receipt of payment upon it. And it sometimes happens, while the mortgage debt remains unpaid, that the mortgagee does, for the accommodation of the mortgagor, consent to give up the mortgage to him, and to have it canceled; retaining the bond however, as evidence of the debt, and relying upon that alone, or taking some other security in the place of the mortgage. In such case, the mortgage might properly, without any receipt of payment endorsed upon it, be given up to the

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mortgagor to be canceled, and to be held by him as evidence that it was no longer a lien upon the premises embraced in it.

It was further urged, that the cancellation of record by the clerk was illegal, because our statute declares that, "when any mortgage, registered as aforesaid, shall be redeemed, paid, and discharged, it shall be the duty of the clerk, on application to him made by the mortgagor or person redeeming, paying, or discharging the said mortgage, and producing to him the said mortgage canceled, or a receipt thereon, signed by the mortgagee or his executors, administrators, or assigns, to enter in a margin, to be left for that purpose opposite to the said abstract, a minute of the said redemption, payment, and discharge, which minute shall be a full and absolute bar to, and discharge of, the said entry, registry, and mortgage." And it is insisted that there was no such receipt of payment endorsed upon the mortgage at the time it was produced to the clerk by Mr. Hubbell, with the seals torn off, and that it had not, in fact, been paid; and that the clerk, therefore, had no right or authority, under the statute, to cancel it of record.

When the mortgage, with the seals so torn off, was produced to the clerk by Mr. Hubbell, he had just before received it in that condition from the hands of the mortgagor, who told him that it was paid, and that he would take it and have it canceled of record. Mr. Hubbell may, therefore, be taken as acting in that matter for the mortgagor; and the clerk, on being satisfied of that fact, might lawfully do with the mortgage the same as if the mortgagor had, in person, and with his own hand, produced it to him, with the seals torn off, and with the request to have it canceled of record. Mr. Johnson had then long been a resident of Newark, was actively engaged in business there, and the owner of a considerable amount of property. Mr. Hubbell was also a resident of Newark, a counselor of high standing in his profession, and often, no doubt, transacting business of that kind at the clerk's office. I think that the clerk did not act illegally, or contrary to the statute, in canceling

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the mortgage of record, under the circumstances of this case. Suppose there had been, at the time when the mortgage was so produced to the clerk to be canceled, a full and explicit receipt, declaring that the mortgage had been paid and satisfied, and such receipt purported to be signed by the mortgagee. How would the clerk know that the signature was genuine? Could he go into the taking of proofs upon that question? How is he to call witnesses? What authority has he to examine them? Would he make such inquiry (if he entered upon it,) *ex parte*, and without notice to the mortgagee, and if not, how shall he summon him to appear? I do not think that the statute meant to impose any such duty upon the clerk.

The case of *Miller v. Wack et al.*, *Saxt.* 204, related to a mortgage which, it was alleged, the mortgagor, after it had been duly executed, delivered, and recorded, obtained from the mortgagee, upon the pretence that he wanted merely to look at it, and that after he so got it into his hands, he refused to give it up, and having canceled it, took it to the clerk's office and had it canceled of record, while the debt which it was given to secure, remained wholly unpaid.

The counsel who argued that such cancellation of record ought to be declared fraudulent and void, and that the mortgage should be held still to be a lien on the premises, and entitled to the same place in order of priority as if such cancellation had not been made, quoted the above mentioned section of our statute in relation to mortgages. And, referring to their having done so, Chancellor Vroom says: "And then they contend, that the fact of the possession and cancellation of the mortgage is not to be taken as evidence of the legal satisfaction and discharge of the mortgage; that this must be proved by the person who holds the priority on the record, as against him who sets up and claims under such canceled instrument. I do not consider this to be the sound construction of the act; and it appears to me that a more dangerous one could not well be given to it. The clerk acts, and must act, upon the simple production of the mortgage,

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with the seals torn off, or the mortgagor's receipt endorsed. He has no judicial power. He is not required to examine witnesses as to the fact of payment; and it is, therefore, true, that the simple cancellation is not an absolute bar, unless there has been actual satisfaction. It is not conclusive evidence. The facts may be inquired into in a proper way."

The Chancellor here is clearly of opinion, that if the clerk acts "upon the simple production of the mortgage, with the seals torn off," he acts legally in canceling the mortgage of record. The clerk did so in the present case. The Chancellor adds, however, that "it is not *conclusive* evidence of payment; that the facts may be investigated in a proper way." In these views I concur. The facts may be so investigated; and when that has been done, and the truth of the case is fully shown, then, what is the law arising upon those facts, and how are the rights of the parties to be affected by them, is next to be considered. That must be done in the present case, and I will presently turn my attention to it. The inquiry now is, was the cancellation of record, which was made by the clerk, upon the production to him of the mortgage with the seals torn off, with a request to have it canceled of record, illegal, because there was not at the time, a receipt of payment endorsed upon the mortgage? I do not think that it was.

It is further alleged by the complainant, that the bond which the mortgage so canceled was given to secure, has never been paid. That allegation is sustained by the proof. It is also alleged, that the mortgage, after it was left at the clerk's office to be recorded, was taken from there by Johnson, without any authority; that he obtained it illegally, and that he caused it to be canceled without the knowledge or consent of the complainant; and that for these reasons, it should be declared to be a valid and subsisting encumbrance upon the mortgaged premises, which, as before stated, are now owned by the railroad company. No witness but Mr. Johnson, speaks of the manner in which he got possession of the mortgage. He says, that after the death of Joseph Harri-

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son, the mortgagee, he called on James Harrison, the executor, and told him that it was time that the title to the one eighth of the property was perfected; that Harrison replied, that it should be done; that he had sent to Ireland by a friend to try to have it done, but did not succeed; but that it should be done, though it might take time; that Johnson then told him, that in view of the fact that he, Johnson, had expended a considerable amount in improving the property, he thought that it ought to be done immediately; that Harrison then told him to go to the clerk's office and get the mortgage, and that he could hold it, until the title was perfected; that he, Johnson, then went to the clerk's office and got it, and kept it in his possession until he conveyed the property to Rusling; that while he so held it, he had several interviews with Harrison, who alluded to the mortgage, and asked Johnson to bring it to him, saying, at the same time, that he would be prepared in a very short time to complete the title; to which request Johnson replied, that that was not the understanding on which he got the mortgage, but that it was to be held by him, "as security for the completion of the title." Johnson also testifies, that in some of those interviews, he told Harrison that he, Johnson, wanted to sell the property.

It appears, therefore, that Johnson took the mortgage from the clerk's office, with the consent, and by request of James Harrison, who, as executor of the mortgagee, was then the owner of it; that he so took it, to hold as security until the title should be completed, and that in violation of this understanding, and abusing the confidence thus reposed in him, he canceled the mortgage, by tearing off the seals, and giving it up to Mr. Rusling and Mr. Hubbell, to be canceled of record, at the same time telling them that it had been paid and satisfied; that they were thus deceived and led to believe that the mortgage was paid; that Rusling, under this belief, bought the property, as free from the mortgage, and paid \$4500 in cash, and gave a mortgage for \$2500 upon the property, to Johnson, to be paid when the title to the one eighth should be completed; and that Rusling

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and Hubbell then took the mortgage to the clerk's office, and had it canceled of record. When Rusling received his deed from Johnson, he received, at the same time, that which enabled him to have the mortgage canceled of record, to wit, the mortgage itself, with the seals torn off; and he might, before actually closing the purchase, and taking his deed, have gone to the office, and had the cancellation of record made, and then have returned to Johnson's house, and accepted the deed. I view this case, therefore, as the same in effect, as if the mortgage had been actually canceled of record, before Rusling received his deed from Johnson. I consider, also, the railroad company, who at the time were represented by Mr. Hubbell, as having all the knowledge of the matter which he had, and that they ought, therefore, to have all the benefits, and bear all the burthens, arising from that fact. The company are now the owners of the property, and the question is, shall this mortgage be declared to be an encumbrance upon it in their hands, or shall the complainant be left to collect the bond from Johnson.

If this question affected only the complainant and Johnson, there would be no difficulty in declaring the mortgage, under the circumstances of this case, to be still a valid encumbrance upon the property. If there were mortgages, or other encumbrances upon it, which were taken subsequently to the canceled mortgage, and while it was still in existence and in full force, and with notice, in law or in fact, that it was an existing encumbrance, it would be just and equitable to declare it to be still a lien, and entitled to priority over such subsequent encumbrances, for they were taken with notice of it, and subject to it. But here is a *bona fide* purchaser, who has bought the property for full value, and paid a large sum of money for it. He bought after examining the record of mortgages to ascertain what liens there were upon it. He relied upon the public record, which the law has furnished for his guide. He found there a registry of the mortgage in question; but before he completed his purchase, the mortgage itself was placed in his hands canceled, with informa-

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tion that it was paid. It was so given to him, in order that he might have it canceled of record, and he was thus enabled to have it done, and did have it done, immediately after taking his deed. In all he did, he acted under the full belief that the mortgage was paid; and I think that, under the circumstances, he was justified in so believing. He used, as it seems to me, all requisite care and diligence to ascertain the situation of the property, as to encumbrances, and to make his purchase a safe one.

Is it equitable and right, now to revive the mortgage as against such purchaser? He did not, by any act, or any neglect, or want of diligence, contribute to the fraud which Johnson committed against the complainant, by canceling the mortgage. The executor of Harrison himself, placed the mortgage in Johnson's hands, that is, consented that he take it from the clerk's office. He thus put it into the power of Johnson to commit the very fraud which he has committed. Johnson took the mortgage from the clerk's office on the second of April, 1856, and held it until the fifth of March, following, so that he had it in his hands for nearly a year. During all this time, Harrison knowing that Johnson wanted to sell the property, and knowing, also, that while holding the mortgage, Johnson had it in his power to mislead an innocent purchaser, took no steps to compel him to give up the mortgage to him, though he had requested him to give it up, and he refused to do it.

If a fraud has been committed, and a loss must, in consequence, fall upon one of two parties, it ought to be borne by the party whose act or default has contributed to the wrong, rather than by the one who had no share in it, who has taken the public records for his guide, and has paid out his money upon the faith reposed in them; for, as already mentioned, I consider this case in the same light, as if the mortgage in question had been actually canceled of record, before Johnson placed the deed in the hands of Rusling.

I think, therefore, that the mortgage ought not now to be decreed to be an encumbrance upon the property, but that

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the complainant should be left to the bond, or to such other remedy as she may have against Johnson, to recover the debt secured by it.

In the case of *The Trenton Banking Co. v. Woodruff*, 1 *Green's C. R.* 117, the question was, whether a mortgage which had been fraudulently canceled, should be revived or not. There was a subsequent mortgage; and the owner of it, who was the party to be affected by such revival, had, as the court adjudged, taken his mortgage with notice that such canceled mortgage was still a subsisting lien upon the property. Chancellor Pennington there says: "It is settled in this court, that the cancellation of a mortgage of record, is only *prima facie* evidence of its discharge, and leaves it open to the party making such allegation, to prove that it was made by accident, mistake, or fraud. On such proof being made, the mortgage will be established even against subsequent mortgagees without notice." And he cites *Miller et al. v. Wack et al.*, *Saxt.* 214; *Lilly v. Quick*, 1 *Green's C. R.* 97.

The question whether a mortgage canceled of record by mistake or fraud, would be established as against a subsequent mortgagee, who took his mortgage *after* such cancellation of record, and in reliance upon the record, and having no notice that such cancellation had been improperly made, was not presented in the case of *The Trenton Banking Co. v. Woodruff*, and it was not necessary in that case to decide it; and I do not understand the Chancellor as intending to decide it. Nor do I find that it was so held in the two cases to which he so refers. So far as I have examined, that question has never been decided in our courts. There are decisions in other states which decide it, or have a bearing upon it.

In *Robinson et al. v. Sampson*, 23 *Me.* 388, a mortgage had been canceled of record by mistake. There was a mortgage subsequent to it, which, however, had been taken *before* such cancellation. The judge, in deciding that case, refers to the opinion of Chancellor Pennington, in *Trenton Banking Co. v. Woodruff*, and quotes from it the same paragraph

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herein above quoted, and there says: "To this position we cannot hesitate to yield our assent, *if the subsequent mortgage, as in this case, becomes such, anterior to the cancellation.*" From which I think it is fairly to be inferred, that if the subsequent mortgage had been taken *subsequent* to the cancellation of record, that the canceled mortgage ought not, in the opinion of the learned judge, to be allowed priority over it.

In *Barnes v. Camack et al.*, 1 Barb. S. C. R. 392, there were two mortgages. The second was taken while the first was upon record. The first was afterwards canceled through fraudulent representations, in which, however, the holder of the second had no part. The cancellation was declared void. And the court, in their opinion, said: "The principle which runs through all cases of this description is, that when the legal rights of the parties have been changed by mistake, equity restores them to their former condition, when it can be done without interfering with any new rights, acquired on the faith and strength of the altered condition of the legal rights, and without doing any injustice to other persons."

This implies that if, as in the case now under consideration, new rights had been acquired upon the faith of the cancellation of the mortgage, the mortgage would not be revived and established, to the prejudice of such rights.

In *Vallé's adm'x v. American Iron Mountain Co.*, 27 Missouri 455, the case was on a petition to foreclose a mortgage which had been canceled of record. The defendants had purchased the mortgaged premises of the mortgagor, while the mortgage stood canceled of record. The plaintiffs alleged that the cancellation was fraudulent. The court decided that the plaintiffs might prove that fact, if they could, but that in order to affect the defendants as *bona fide* purchasers, it must be shown also, that at the time of the purchase, they knew of the fraud. The judge says: "Of course the fraud must be brought home to the defendants; if they purchased without knowledge of the fraud, the entry (meaning the entry of the cancellation), is conclusive as to them."

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The case of *Ely v. Schofield*, 35 Barb. S. C. R. 330, was for the foreclosure of a mortgage.

It appeared that a mortgage had been given upon certain premises, and duly recorded, and that it was afterwards canceled of record by mistake, and without being paid. While it stood canceled of record, the mortgagor sold the premises; the purchaser, having first caused a search of the records to be made by the clerk, and received from him a certificate, in which the mortgage was noted as having been duly discharged. After the purchaser had taken his deed, and *had had it recorded*, the owner of the mortgage gave him notice that it had been canceled by mistake, and that he claimed that it was still a subsisting lien upon the premises. It was decided by the court, that the purchaser was entitled to hold the premises free from the lien of the mortgage. But that, if such notice had been given to the purchaser *before* he had put his deed upon record, then, under the peculiar provisions of the statute of that state, relating to such matters, the mortgage would have been a lien upon the lands, in the hands of the purchaser.

In *Executors of Swartz v. Leist*, 13 Critchfield (Ohio) Rep. 419, a mortgage was executed to Mr. Little to secure certain promissory notes, held by different persons. Little held one of them, and afterwards transferred it to Swartz, testator of plaintiffs. After this, and while that note was yet unpaid, Little canceled the mortgage of record; and while it stood so canceled, the mortgagor sold the mortgaged premises to Leist, the defendant, who was a *bona fide* purchaser, and had no notice that the cancellation was fraudulent. The court held, that the cancellation was a fraud upon the rights of the holder of the note; but yet, that as against the *bona fide* purchaser, the mortgage could not be declared a lien upon the lands. The court said, among other things: "But the parties here are not equally faultless, and do not stand *in equali jure*. Swartz negligently, or confidingly, permitted Little, the mortgagee, to retain the legal title conveyed by the mortgage, and the power of control over it. Little thus

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had the legal power, and ostensibly a perfect right, to discharge and release it. Leist, the purchaser, having no reason to suspect fraud, was justified in regarding the release, legally made by one who was ostensibly the proper party, as an effectual discharge of the lien. *And as between these parties, he who unwisely reposed confidence in Little, and gave him the power to defraud, should suffer the consequences."*

The application of these decisions to the case under consideration, is obvious, and I need not remark upon them.

I am of opinion that the complainant is not entitled to the relief prayed for, and that the bill of complaint should be dismissed; and I respectfully advise the Chancellor to make a decree accordingly.*

* Decree reversed, 4 C. E. Gr. 488.

CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF THE
STATE OF NEW JERSEY.

OCTOBER TERM, 1867.

DORSHEIMER *vs.* ROORBACK.

1. Idiots and lunatics *must* sue in equity, by their committees or guardians; in this state, by their guardians.

2. A bill filed in the name of an idiot by a volunteer, styling himself her next friend, not appointed her guardian upon inquisition found, nor authorized by the court to file the bill as her next friend, will be dismissed on motion of the defendant.

This was a motion on part of the defendant to order the bill to be taken from the files, on the ground that the complainant was an idiot, and the bill was filed in her name by one Couse, as her next friend, he not having been appointed her guardian upon inquisition found, or been authorized by this court in this case to file the bill as her next friend.

Mr. McCarter, in support of the motion, cited—

2 *Barb. Chan. Pr.* 224; *Mitford Pl.* 187; *Shelford on Lun.*

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395-6; 1 *Daniell's Chan. Pr.* 107; *Story's Eq. Pl.*, § 64 and notes; *Stock on the Law of Non Compotes Mentis* 33-4.

Mr. Linn, contra.

THE CHANCELLOR.

The motion is made by the defendant, and not on part of the idiot, or any one in her behalf. But in this case, where it is alleged in the bill that complainant is an idiot *a nativitate*, and unable to manage her affairs, and sues by a person calling himself her next friend, without any appointment, if the proceeding is not according to law, and not binding on the idiot, the defendant must make this motion to protect himself from being obliged to defend a suit brought without authority.

Idiots and lunatics may sue at law by next friend, to be appointed by the court; but in equity, must sue by the committee or guardian of their estates duly appointed. When the idiocy or lunacy is not partial, and, in all cases, when it has been found on an inquisition, a court of equity will not allow a suit to be brought by an idiot or lunatic in his own name, or that of a next friend, nominated by himself, or appointed by the court; his guardian or committee must join in the suit. When a person is only partially incapable, as one merely deaf and dumb, the court will appoint a next friend to be joined with him in the suit, and to conduct it for him.

The authorities all agree that idiots and lunatics *must* sue in equity, by their committees or guardians. In this state, the persons to whom the estates of idiots and lunatics are committed upon inquisition found, are styled their guardians; in many of the other states, and in England, they are called their committees.

Shelford on Lunatics 415, says: "Idiots and lunatics *must* sue in courts of equity by their committees." In *Story's Eq. Pl.*, § 64; 1 *Daniell's Chan. Pr.* (3d ed.) 79; *Stock on*

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Non Compotes Mentis 33; *Mitford Eq. Pl.* 29, and 2 *Barb. Chan. Pr.* 224, the same rule is laid down; and it is further stated by some of these authorities, that a suit ought not to be brought, even by the committee, without the direction of the court, upon an inquiry made, whether it is for the benefit of the idiot or lunatic. I find no case or authority in which it is held that they may sue by a next friend, either a volunteer or appointed for the purpose.

The only semblance of authority found, is the passage in *Shelford* 416, and copied in 1 *Daniell's Ch. Pr.* 81: "If a person exhibiting a bill, appear upon the face of it to be either an idiot or a lunatic, and no *next friend* or committee is named in the bill, the defendant may demur." *Daniell* cites *Fuller v. Lance*, 1 *Ch. Cas.* 19, which has nothing in it on this point. *Shelford* cites *Mitford on Pl.* 153, which says: "If an *infant* or a *married woman*, an idiot or a lunatic, appear to be such on the face of the bill, and no next friend or committee is named, the defendant may demur."

Lord Redesdale evidently intends to refer *singula singulis*, and does not mean to imply that a next friend is proper for an idiot or lunatic, any more than that a committee is necessary for an infant or *feme covert*. This passage has been adopted by the other two writers, without noticing that the words next friend were not applicable to the subject of which they were then treating—idiots and lunatics.

The rule is a wise one. It should not be permitted that any volunteer should, by styling himself the next friend of an idiot, bring a suit for him, and lose or jeopard his rights by an action brought inopportunately, and it may be, prosecuted without skill or honesty. The idiot would have no security for the amount recovered by such next friend, and the defendant could not pay him, or settle with him, safely.

The motion to take the bill from the files must be granted.

Weber v. Weitling.

WEBER vs. WEITLING and others.

1. Proceedings by foreign attachment are not void, merely because the defendant was a resident of the state at the issuing of the attachment. The foundation of the proceedings, and of the jurisdiction of the court, is not the non-residence of the defendant, but the affidavit of the plaintiff's belief of his non-residence.

2. When such affidavit is regular, and made in good faith, this court cannot collaterally inquire into the fact of non-residence, and declare the proceedings void.

3. The estate of a lunatic may be proceeded against by attachment; and he need not appear and be defended by his next friend.

4. Mere inadequacy of consideration will not avail to set aside a deed, unless accompanied by fraud, or unless it be so gross as to imply fraud.

5. A bid of \$100 at a fair public sale, for property worth \$1500, but upon which there were liens, amounting to \$800, there being no pretence of fraud, held not to be so grossly inadequate as to set aside the deed.

The cause was argued on the pleadings and proofs.

Mr. Dixon, for complainant.

Mr. Lyons, for defendants.

THE CHANCELLOR.

The suit is by Jacob Weber, guardian of August Hill, a lunatic, to set aside a deed by auditors in an attachment against the lunatic, to the defendant, Louise Weitling, for the lunatic's lands, which she afterwards conveyed to the defendant, Justus Hill, a brother of the lunatic. The lunatic, who had resided on this property in Hudson City, was sent to the asylum at Trenton, in August, 1861, under the conduct of Weber, who was one of the chosen freeholders of the county. In March, 1862, the wife of the lunatic abandoned her husband's home, taking with her his furniture, and his only child, who has since died. She took up her residence with Weber, who was a widower, and has ever since resided with him as his house-keeper. She declined, when examined

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as a witness, to answer whether she was living with him as his wife ; this was done under the advice of counsel, on the ground that the court had stricken from the answer the charges of her adulterous intercourse with Weber, as impertinent and scandalous. Her evidence was competent, but if guilty, she had the right to refuse. The lunatic, after his wife had for some time been living with Weber, was brought from the asylum, and placed in the county alms-house, at Snake Hill. Being quiet and harmless, he was allowed to go about ; he went several times to see his child, at Weber's, where his wife was living. He went to his old home, and found it occupied by strangers, to whom his wife or Weber had rented it. He at last left the alms-house and the county, and in March, 1864, went to reside with his brother, Justus Hill, in the city of New York, where he has ever since continued to reside, working at his trade as a shoemaker, and partially earning his support.

On the twentieth of August, 1864, an attachment was issued against him as a non-resident debtor, from the Hudson county Circuit Court, by the defendants, Ernest Weitling, and Louise, his wife, for a debt due to her. The land in question was attached, and the suit proceeded regularly to judgment ; and under it, the land was sold at public auction, and conveyed by the auditors to Louise Weitling, in September, 1865. The price bid was \$100 ; the property was subject to a mortgage for \$500, and was worth \$1500 or \$2000. A few days afterwards, she conveyed the same to Justus Hill, for \$1150, or about \$600 above the mortgage. The debts, costs, and expenses of sale, in the attachment suit, were nearly \$300.

In November, 1865, the wife of the lunatic applied to this court for a commission of lunacy. This commission issued ; and upon the return of the inquisition finding him a lunatic, the proceedings were remitted to the Orphans Court of Hudson county, who appointed Jacob Weber the guardian of the lunatic.

The complainant contends, that the deed should be set

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aside, on the ground that the proceedings in attachment were void, the lunatic at the time being legally a resident of this state, and not subject to an attachment; that an attachment, or other proceedings at law, cannot be had against a lunatic, unless he appear and be defended by his next friend; and that the sale, if not void, should be set aside in equity, on the ground of gross inadequacy of consideration.

The proceedings by foreign attachment are not void, merely because the defendant was a resident of the state at the issuing of the attachment. By the act, the foundation of the proceedings, and of the jurisdiction of the court, is not the non-residence of the defendant, but the filing of an affidavit by the plaintiff that he believes him to be a non-resident. If such affidavit is made in good faith, the proceedings are not void. The court, pending the proceedings, will inquire into the truth of the affidavit, and if it appears that the affidavit is not true, will arrest the proceedings and quash the attachment. In this case the affidavit was regular, and made in good faith, and the court cannot collaterally inquire into the fact of non-residence, and declare the proceedings void.

But in fact, the lunatic was not, at the attachment, a resident of this state. He had no home here; his wife had abandoned him and his home, and his house was rented to and in possession of strangers. He had no family. The question is not as to his domicile, but his residence. A man may not change his domicile, he may do nothing to acquire or establish a new domicile, but may have abandoned his residence. If a resident of the state sells his homestead, and goes to Europe with all his family, with the intention of remaining a few months, or a few years, and then returning and purchasing a new home somewhere in the state, and residing here, he acquires no new domicile; he is a citizen of New Jersey, but he has no residence here. The test of residence under the attachment act, is whether a person has such residence in the state as that a summons can be served. If he has not, his creditors are entitled to some remedy against his estate here. Now this lunatic had no home in this state where a

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summons could be served by leaving a copy with a member of the family. He had a residence in New York where he had lived and worked for months, and where he still continues to live. It is not necessary to decide that he had acquired a new domicile, or that a lunatic may have intellect enough to form the intention necessary to a change of domicile, although unable to manage his affairs.

An action at law can be maintained against a lunatic, and the judgment against him is valid. *Shelford on Lun.* 395; *Kernot v. Norman*, 2 T. R. 390; *Nutt v. Verney*, 4 T. R. 121; *Robertson v. Lain*, 19 Wend. 650.

If a personal suit can be maintained at law against a lunatic, there is no reason why a proceeding against his estate by attachment is not valid.

For mere inadequacy of consideration, equity does not set aside a deed, unless accompanied by fraud, or unless the inadequacy is so gross as to imply fraud. This was a fair public sale by auditors; no fraud is pretended; the price was inadequate. The property was worth \$1500 at least, and the bid was only \$100; but there was a mortgage for \$500, and Mrs. Weitling's debt was near \$300. The consideration is not so grossly inadequate as to call upon the court to set aside the deed.

The bill must be dismissed, with costs.

MILLS vs. MILLS.*

1. A general charge that the wife is an adulteress, is not sufficient to support a bill for divorce. The adultery must be designated, either by the name of the adulterer, or by circumstances, and the time when, and place where, it was committed.

2. Where the charge is of adultery with *divers* persons, whose names were unknown, and the only proof is of adultery with one person, who was well known to the complainant, the variance is fatal.

3. Bill dismissed, without prejudice to filing a new bill for adultery with the person against whom the crime was proved.

* CITED in *Reid v. Reid*, 6 C. E. Gr. 333; *Black v. Black*, 11 C. E. Gr. 432.

Rogers v. Rogers.

Mr. Gage, for complainant.

THE CHANCELLOR.

In this case, the only adultery charged, is that with divers persons unknown to the complainant. Apart from the proof, no divorce can be granted on such bill. The adultery charged, must be designated either by the name of the adulterer, or by circumstances, and the time when, and place where, it was committed. Charging a woman with being an adulteress generally, is not sufficient. *Marsh v. Marsh* 1 C. E. Green 391.

If this objection to the pleading had no foundation, the proof fails. The charge is of adultery with *divers* persons, whose names were unknown. The proof, and only proof, is of adultery with one Joshua H. Butterworth, whose person and name were well known to the complainant, as appears by the evidence.

The bill must be dismissed, without prejudice as to filing a new bill for adultery with Joshua H. Butterworth.

ROGERS vs. ROGERS.*

1. The publication and service of the order upon an absent defendant, instead of a notice, as required by Rule 145, after May first, 1867, is a formal objection; in this case it was waived upon the production of additional proof to remove substantial objections.

2. It must clearly appear that the notice was sent to the defendant's post office address. That the solicitor was informed that the address to which it was sent was the defendant's address, without stating the source of information, or that he was *credibly* informed, and "verily" believes, is not sufficient.

3. Absence from the wife for three years, is not necessarily desertion in the legal sense of the term. The circumstances and manner of the desertion must be shown, that the court may determine the intent.

* CITED in *Dinsmore v. Westcott*, 10 C. E. Gr. 304; *Tate v. Tate*, 11 C. E. Gr. 56.

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The petitioner filed her petition in this court for a divorce, on the ground of desertion ; her husband having left her, and absented himself for three years. It appearing by affidavit, that the husband was out of the state, she took an order of publication. A copy of this order, instead of the notice required by Rule 145, was sent to Charleston. An affidavit was filed by the solicitor, stating that he had been "informed" that Charleston was his post office address. The circumstances and manner of the desertion did not appear.

Mr. Mockridge, for petitioner, *ex parte*.

THE CHANCELLOR.

1. The publication and service is of the order, and not of a notice, as required by Rule 145, after May first, 1867.

2. The notice was sent to Charleston, but it does not sufficiently appear that this was defendant's post office address. The fact that the solicitor was so informed, without stating the source of information, or that he was *credibly* informed, and "verily" believed, is not sufficient.

3. It is clearly proved that defendant left his wife and stayed away three years.

These facts may exist, and yet there be no desertion in the legal sense of the term. Many of our naval officers are off on a three years' cruise. This is no cause of divorce.

The circumstances and manner of the desertion must be shown, that the court, and not the witnesses, may determine whether the defendant intended to abandon his wife, and when such abandonment commenced.

If the second and third grounds of refusal are removed by additional proof, the first, being merely formal, will be waived.

Stevens v. Wilson.

STEVENS vs. WILSON.*

Upon a bill filed to compel a transfer of two hundred shares of stock, purchased by the defendant, with money advanced by the complainant upon the following order, viz., "Please pay to order of D. M. W. \$5000, for which he will give you a receipt, to be paid in stock of the Newark Plank Road Co., say two hundred shares, or money return in same proportion, at that rate, \$25 per share;" *held*, that the meaning of the contract was, that if the defendant could not, or did not buy the stock at par, he should return the money; that when he purchased the stock with complainant's money, he held it as trustee for complainant; and that he must transfer the stock to the complainant, and account for all the dividends, with interest.

The cause was argued upon the bill and answer.

Mr. T. Runyon, for complainant.

Mr. Keasbey, for defendant.

THE CHANCELLOR.

The defendant, in April, 1860, was president, and a director of the Newark Plank Road Company, and held some of its stock. The New Jersey Railroad Company were buying up stock of this company for the purpose of obtaining the control of it; the defendant was interested in keeping the majority of the stock and the control of the company out of their hands. He applied to the complainant, who, on account of his interest in a rival scheme, wished to keep the plank road out of the control of the railroad company, to aid him in buying up and holding the stock. The complainant did not desire the plank road stock as an investment, but was desirous to aid the defendant in accomplishing his design of keeping the control out of the hands of the New Jersey Railroad Company, and agreed to advance \$5000 for that purpose. The money was advanced on the twenty-eighth

* CITED in *Cutting v. Dana*, 10 C. E. Gr. 270.

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of April, 1860, by an order given by Stevens upon his agent, W. W. Shippen. This order and the receipt of Wilson annexed, the defendant in his answer says, contain the terms on which the money was advanced, and the mode in which it was to be disposed of. The order and receipt, as set forth in the answer, are as follows :

“HOBOKEN, April 28th, 1860.

W. W. SHIPPEN, ESQ., Sir:—Please pay to order D. M. Wilson \$5000, for which he will give you a receipt, to be paid in stock of the Newark Plank Road Co., say two hundred shares, or money return in same proportion, at that rate, \$25 per share.

E. A. STEVENS.”

“Received, Hoboken, April 28th, 1860, \$5000, as per stipulation within, to be transferred to order or request of Mr. Stevens, when he shall desire.

D. M. WILSON.”

The defendant, upon receiving the money, purchased with it two hundred shares of the stock of the plank road company, which he caused to be transferred to himself, and still holds, having since received all the dividends thereon, commencing with the dividend of July first, 1860.

About two years after the purchase, the complainant requested the defendant to transfer the stock to him. Wilson declined to do this, saying that he supposed Mr. Stevens never intended to ask him for the stock, or the money; and afterwards, the complainant, by a written notice, required the transfer, and upon refusal, filed his bill in this case to compel the transfer.

The defendant contends that, by the terms of the contract in the papers, and by the understanding between him and complainant, he was, at his option, to return either the stock, or the money with the interest, and offers to pay the money, with the interest.

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The question is upon the meaning of the contract, as contained in the writings. Whether this is such a contract as will merge in the writings all the verbal understanding and conversation at and before the making of it, need not be considered here, for the answer says it contains the terms of the agreement, and although it states what was their understanding of the contract, it does not state any conversation or verbal agreement in which that understanding was embodied ; so we can only infer that such understanding means the interpretation of the agreement.

The order is in the curt, elliptical form, used by business men, and is not entirely free from ambiguity, and must be interpreted by the circumstances under which it was given.

The complainant did not desire to own or hold plank road stock, but did desire to aid the defendant in retaining the control of the road, and was willing to advance the money and risk it in stock at par, and to stand the loss if it depreciated ; he was not willing, or, at least, did not agree to pay, over par.

The defendant wanted the aid of the complainant in precisely that way ; he wanted Stevens to aid in controlling the direction of the road, by advancing money to buy stock, at his own risk. He did not want a loan of money to enable himself to buy stock, at his risk. He, for aught that appears, was a capitalist, able to buy without borrowing, or to borrow of the banks. He appealed to Stevens' spirit of rivalry to the New Jersey road, and not to his own credit. Nor was his object to make personal gain by having the stock in such position that he should have the advantage of the rise, and Stevens run the risk of depreciation. He did not, and, from the circumstances, it is plain that he would not make such a proposition ; it would have defeated his object.

Under these circumstances, and the additional fact, which must be taken for granted, that it was possible that he might not be able to purchase the shares at the price limited, this money was advanced. And, under such circumstances, although the complainant possibly might agree that

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the defendant should buy the shares, and return them or the money to him, at his option, after he ascertained which would be most profitable for himself, an agreement so inequitable will not be inferred from doubtful terms; it must clearly appear.

The terms of the receipt are to pay in stock, or return the money; the expression "or money return," can mean nothing else; it is not *to repay* in money, but *to return* the money, and of this, the natural meaning would be, that he should return the same money, not the same identical coin or bills, but the money without having used it; this is strengthened by the fact that interest is not mentioned. If it was meant that he should hold the stock two or five years, and then at his option, transfer the stock or repay the money, it would have been with interest.

The contract means that if he could not, or did not buy the stock at par, he should return the money; one of these was to be done. When he purchased the stock with Stevens' money, according to the rule of equity, he held that stock as trustee for Stevens, and nothing but a clear, positive agreement by Stevens, will enable him to speculate on the trust property for his own benefit, and at his option, to appropriate the profits, and put the risks upon his *cestui que trust*.

The terms of the receipt, "to be transferred to the order of Mr. Stevens *when* he shall desire," show plainly that it was intended that the stock itself, if well purchased, should be held for him, and transferred when he requested. He did not wish to appear as the owner of the stock; he had a reason for having it in the name of another, but by this he secured the right of having it transferred to any other person than the defendant, at his option.

The defendant must transfer to the complainant these two hundred shares of stock, and account for all the dividends received upon them, with interest.

Harrison v. Stewart.

HARRISON vs. STEWART.*

A mortgage executed by a married woman, as a *feme sole*, she living apart from her husband, upon her separate property, to secure a debt contracted by her and for her benefit, is a valid lien upon such property.

The cause was argued on bill, answer, and proofs.

Mr. J. W. Taylor, for complainant.

Mr. Vanatta, for defendant.

THE CHANCELLOR.

The bill is filed to foreclose a mortgage given by the defendant, Sarah L. Stewart. She was a married woman, living separate from her husband, and made a mortgage upon her own real estate that had been conveyed to her during separation. She gave a bond and mortgage to the complainant, as if she was a *feme sole*. The complainant did not know that she had a husband living at the time. The consideration of the mortgage was the surrendering and canceling another mortgage on the lands, held by the complainant.

The mortgage and bond, being given by a married woman, without her husband, and without an acknowledgment proper in such case, are both void. The mortgage cannot be foreclosed, nor any remedy had on it. But the debt was contracted by the defendant when married, for the benefit and advantage of her separate estate; and she had power to charge her separate estate with the payment of it, and such charge will be enforced in equity. *Wilson v. Brown*, 2 *Beas.* 277.

In this case it appears that the debt was contracted for the benefit of her separate estate; giving up a mortgage on it was for her advantage, and is a sufficient consideration. The defendant, by attempting to execute a new mortgage,

* CITED in *Cutler v. Tuttle*, 4 C. E. Gr. 560; *Armstrong v. Ross*, 5 C. E. Gr. 116; *Perkins v. Elliott*, 7 C. E. Gr. 128; *Ferry v. Laible*, 12 C. E. Gr. 150.

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plainly showed her intention to charge her separate property with the debt.

The facts set forth in the bill will warrant this relief. Although the special prayer of the bill is for a foreclosure, and sale of the premises, yet the general prayer for relief will entitle to any relief that is warranted by the facts in the bill.

The complainant is entitled to have his debt made a lien on her separate property, and have that sold for the payment thereof.

The agreement to pay seven per cent. is sufficiently proved ; it needs no further consideration than that. The mortgage was, by mistake, drawn at six per cent. ; her note acknowledged the mistake, and agreed to pay seven. The interest must be computed at seven per cent.

STEINBERGER'S TRUSTEES vs. POTTER.

1. A marriage settlement, by which an intended wife conveyed to trustees, all property which she then had, and *to which she might thereafter become entitled, &c.*, does not, at law, convey the after acquired property. Equity will construe such instrument as a contract to convey, and enforce its performance, only when necessary to effect the plain intent of the parties.

2. Such settlement construed as an agreement to convey only such property as the wife might acquire *during marriage*.

Mr. Parker and *Mr. Keasbey*, for complainants.

Mr. Williamson, for defendants.

THE CHANCELLOR.

The suit is by Gordon and Potter, trustees under a marriage settlement, against Alice B. Potter, and her infant son, James Potter. The defendant, Alice B. Potter, then Alice B. Steinberger, on the twenty-second of July, 1863, being about to contract a marriage with John Hamilton Potter,

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entered into a marriage contract between herself, of the first part; her intended husband, of the second part; and the complainants, as trustees, of the third part. By it, she conveyed to the trustees all the property she might then be entitled to, under the will of her grandfather, or otherwise, and all property *to which she might thereafter become entitled*, in trust for her use during her natural life, and after her decease to the use of her husband during his life, and after the death of the survivor, to the use of her children, in fee; and if she died without issue, to such persons as she might, by will, appoint; and in default of both appointment and issue, to her next of kin, in fee; with a covenant by her husband, to join in any conveyance necessary to assure such property to the trustees.

After the marriage and the birth of one child, the defendant James Potter, the husband died intestate, leaving large real and personal estates.

The object of the suit is to have the share of Alice Potter in her deceased husband's estate, conveyed to the complainants as trustees under the marriage settlement, for the purposes of the settlement.

The articles of settlement do not, at law, convey to the trustees the after acquired property; and if they are entitled to have it conveyed, this court should give the relief prayed for.

I think the only intention and object of this contract was to secure to the defendant, Alice, during coverture, and to her husband for life, if he survived her, and to her children after her death, such property as she then had, and might acquire *during marriage*. It is true that, by the words of the instrument, all property she might at any time after its date become entitled to, is conveyed. But this instrument is not an agreement by her, to convey; and the only manner in which a court of equity will give effect to such instrument, which, at law, does not convey after acquired property, is by considering it as a contract to convey, and enforcing the performance of that contract. Marriage is a valuable considera-

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tion, and the issue, represented here by the complainants, are within that consideration, and if necessary to effect the plain intent of the parties declared by the instrument, this court will consider it a contract.

But as the instrument contains no agreement to convey, the court will not construe it into such an agreement, for the conveyance of property that may devolve upon the defendant at or after the termination of the marriage. Such was not the express, or the presumed object of such a contract. If such construction were given to it, any and all property to which she might become entitled for her whole life, if it extended to seventy years, and the estates amounted to millions of money, must be conveyed to these trustees, and be held in trust for her life, with no possibility of her enjoying the principal; it would include property acquired by any future marriage. For such purpose, a court of equity will not convert an inoperative conveyance into a contract to convey, and defeat, instead of carrying into effect, the object of the parties.

The relief prayed for must be denied.

COWART vs. PERRINE.

1. The statute of limitations is a bar in equity, to an account between partners.

2. A submission to arbitrators, of partnership affairs, without limit as to time, cannot keep any claim that might have been included in the submission, alive for the purpose of a suit indefinitely.

This was a motion to strike out the plea filed by defendant, as improper, and improperly pleaded. One of the grounds of the motion was, that the plea was not properly sworn to, as required by the statute. This ground was waived by a consent to amend the plea in that particular, and the motion was, by consent, then argued upon the sufficiency of the plea as a defence in this case.

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Mr. W. H. Vredenburg, in support of the motion.

Plea is not *formally* pleaded as required by our statute. *Nix. Dig.* 107, § 86.

Even if formally pleaded, it is not a good plea in this suit. The statute of limitations does not apply to accounts between merchant and merchant. *Nix. Dig.* 469-70, § 8. Nor between partners. See opinion of Kent in *Ray v. Bogart*, 2 *Johns. Cas.* 436; *Coster v. Murray*, 5 *Johns. C. R.* 524-5; *Catlin v. Skoulding*, 6 *Term* 189; *Sandys v. Bladwell*, *Sir Wm. Jones* 401; *Foster v. Hodgson*, 19 *Ves.* 180.

The claim contained in the bill related to the *execution of a trust*, and therefore, was not within the statute. *Wanmaker v. Van Buskirk*, *Saxt.* 685; *Allen's Adm'r v. Woolley's Ex'rs*, 1 *Green's C. R.* 209; *Decouche v. Savetier* 3 *Johns. C. R.* 216; *Goodrich v. Pendleton*, *Ibid.* 387; *Coster v. Murray*, 5 *Johns. C. R.* 531; *Obert v. Obert*, 1 *Beas.* 430; *Lawly v. Lawly*, 9 *Mod.* 32.

The distinction in case of *Kane v. Bloodgood*, 7 *Johns. C. R.* 90, is, that the trusts intended by the courts of equity not to be reached or affected by the statute of limitations, are those technical and continuing trusts, which *are not at all cognizable at law*, but fall within the proper, peculiar, and *exclusive* jurisdiction of this court.

Partners are *trustees* for each other, and *there is no compulsory remedy at law* between them.

Statute does not apply to joint tenants or parceners. *Prince v. Heylin*, 1 *Atk.* 493.

Six years next after cause of action accrued to complainant, has not elapsed. A pure plea of the statute is no bar where there are circumstances stated in the bill which take the case out of it. *Kane v. Bloodgood*, 7 *Johns. C. R.* 133, and cases there cited.

The complainant had no right of action after the agreement to refer to arbitrators in 1853, until notice was given him that arbitrators refused to act.

The reference to the arbitrators suspended the right of action to both parties during its continuance. The notice

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from arbitrators as stated in bill, was not served on complainant until within six years before the commencement of the action.

Neither party had a right to bring suit against the other while arbitration was unfinished.

It is well settled, that plea *admits* all the facts alleged in bill, which it does not expressly controvert.

The articles of arbitration was a *new promise and agreement*, and that neither party can take advantage of it to bar any rights lost through its continuance. *Beams' Pleas* 169; *Pomfret v. Windsor*, 2 *Ves.*, *sen.*, 485; *Andrews v. Brown*, *Prec. in Chan.* 385; *Baillie v. Sibbald*, 15 *Ves.* 185; *Barington v. O'Brien*, 1 *Ball & B.* 178.

In the last case considered a *fraud* by one party to persuade the other not to prosecute, by holding out promises until the debt is barred by the statute.

The complainant had every reason to believe the arbitrators would act, until notified by them to the contrary, and *he has brought his suit within six years after such notification*. Will this court turn him out remediless?

We submit that plea is neither formally, nor in substance, a good plea, and ought to be overruled.

Mr. P. D. Vroom, contra.

THE CHANCELLOR.

The bill was filed by the complainant, to compel the defendant to account for the affairs of a partnership, formerly existing between them, which was terminated in 1853. The agreement to dissolve, contained a provision to submit all matters in difference, which should arise between them, to two arbitrators named. The bill alleged that the arbitrators were convened in January, 1860, to settle difficulties between them; that the defendant, under the pretence of it being necessary to go to New York, refused to proceed, and left the arbitrators, agreeing to appear and proceed before them

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in March, then next, but refused and neglected to appear and proceed then, or at any other time; and that, in consequence of his refusal, the arbitrators, by a writing duly executed by them, on the sixth day of July, 1861, and in thirty days afterwards served on the defendant, declined to act further between the parties. The bill was filed on the fifth day of July, 1867.

The defendant pleaded that he had not become liable to account, or to the action, or on any promise, within six years, and that the action was barred by the statute of limitations; and by an answer annexed, in support of the plea, admitting the submission and meeting before the arbitrators in January, 1860, denied that he promised to appear before them in March of that year, or at any other time, and also denied that he was afterwards requested to appear before the arbitrators.

It is well settled, that the statute of limitations is a bar to suits in equity in all cases in which it would bar the same suits at law. The only exceptions are, when the suit concerns a trust, or a subject of pure equity cognizance that could not be entertained in the courts of law. 1 *Daniell's Chan. Prac.* 664; *Angell on Limitations*, §§ 25 to 30; *Mitford's Eq. Pl.* 269; *Story's Eq. Pl.*, § 751; *Wanmaker's Ex'rs v. Van Buskirk*, *Saxt.* 685; *Allen's Adm'r v. Woolley's Ex'rs*, 1 *Green's C. R.* 209; *Dean v. Dean*, 1 *Stockt.* 425.

The statute of limitations expressly includes actions of account, which will lie at law or in equity between partners, and the statute is therefore held to be a bar in equity, to an account, and to an account between partners. *Angell on Limitations*, § 27; *Collyer on Part.*, § 374-5-6; *Barber v. Barber*, 18 *Ves.* 286; *Tatam v. Williams*, 3 *Hare* 355; *Atwater v. Fowler*, 1 *Edw. C. R.* 423.

The only question then is, whether any facts averred in the bill, and not denied in the answer in support of the plea, will take the case out of the statute, and avoid the bar.

The only matter that is relied on, is the submission to arbitrators contained in the articles of dissolution, and the

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fact that this submission was not terminated until July sixth, 1860. The answer denies that anything was done by the arbitrators from 1853 until 1860, and denies that defendant then agreed to appear before them again, or that he was ever after that requested to appear.

The appearance before the arbitrators in January, 1860, might possibly be considered an admission that there was something unsettled at that time; but as it is not necessary to decide this, no opinion is given upon it. But from that day until the filing of the bill, there is nothing which can be construed into an admission that there was any debt or unsettled account.

An agreement to submit all disputes to arbitrators, provided they should make their award within two years, would not prevent the statute from running during those two years, if nothing whatever was done by the defendant or arbitrators within those two years; nor can a submission, without limit as to time, have the effect of keeping any claim that might have been included in the submission, alive for the purpose of a suit for an indefinite time.

I am of opinion that the statute of limitations is a good bar to this suit; and that, taking for true every fact alleged in the bill, not denied by the answer annexed to the plea, which is the rule in such case, there is nothing to prevent the plea being a bar to the relief prayed for by this bill.

The motion to strike out must be denied. The complainant may still, if he chooses, reply to, and take issue upon it.

Lewis v. Schenck and Smith.

LEWIS vs. SCHENCK and SMITH.*

1. A material alteration of a note by the payee, without fraudulent intent, though it avoids the note, does not deprive him of his right to recover the original debt.

2. In such case, the action for the recovery of the debt should be brought at law. But the alteration being made under misapprehension, and the discovery prayed by the bill being in some decree necessary to show the agreement and the mistake, jurisdiction of this case sustained.

Mr. Linn, for complainant.

Mr. J. V. Voorhees, for defendants.

THE CHANCELLOR.

On the seventh day of February, 1863, Henry A. Herder, sheriff of Somerset, sold a farm of the defendant, Schenck, by virtue of several executions in his hands; one of these was in favor of the complainant, Lewis, and there was due on it \$551.64, besides costs. Before the sale, Schenck represented to Vanderbeck, the agent of Lewis, who was not present, but at his home, in Ohio, that the defendant, Smith, would buy in the farm for him, and requested Vanderbeck to give him eight months' time to pay Lewis' claim, for which he and Smith would be responsible. Vanderbeck agreed to this, and Schenck and Smith agreed with Vanderbeck that they would pay Lewis his claim in eight months, and give their note, payable at bank, for the amount. The property was sold by the sheriff to Smith for \$11,051, being the full amount of the claims in the sheriff's hands, including all costs and expenses. After the sale, on the same day, Schenck and Smith made their joint and several note to Lewis for \$551.64, payable to him or bearer at eight months from date, and gave it to Vanderbeck, who thereupon gave the sheriff a receipt for the execution debt of Lewis. The sheriff afterwards delivered the deed to Smith, without any

* CITED in *Hunt v. Gray*, 6 Vr. 234.

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further payment of the judgment of Lewis; this note, or rather Vanderbeck's receipt, being taken by him as payment of that claim. Vanderbeck, on the day of the sale, after Schenck and Smith had left, had some conversation with the sheriff about the note, and the fact that it did not include interest for the eight months, which both supposed it ought to have included. He supposed that such was the understanding, and that the omission was a mistake which he had a right to correct, and he altered the note in the presence of the sheriff, by adding the words "with interest from date." Lewis did not know of the alteration until after the note became due. When it became due, Schenck and Smith refused to pay it on account of the alteration. They both testify, that the agreement or understanding was not to pay interest, but only to pay the money at the end of eight months; and they refused to pay any part of the note, contending that the alteration of the note made it void, and that the complainant had no remedy against them.

The complainant relinquished his suit at law against them, and filed his bill in this court to compel the payment of the amount due on his execution, which the defendants had promised to pay.

The complainant gave a receipt to the sheriff, and authorized him to deliver the deed without further payment of his claim, upon the promise of the defendants, and their note given as evidence of it, to pay the claim in eight months. It was a bargain made by them with him, and not with the sheriff; it was a bargain made upon a good and valid consideration. The mere verbal promise was good; it was to pay a debt of their own, not that of another, and not within the statute of frauds. The note was given to secure the money they had so promised to pay. The consideration was, that the sheriff conveyed to Smith, for the use of Schenck, the interest which Lewis had in this farm by the lien of his judgment.

The alteration of the note by Vanderbeck was of a material part, and not authorized by the makers, either directly,

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or by implication from the fact that it was intended to be given with interest. The proof shows that it was not so intended. But Vanderbeck, thinking that such was the intention, supposed he had power to correct it, and made the alteration for that purpose. He made the alteration without any fraudulent intent, but under a mistake of the facts.

In such case, although the alteration avoids the note, yet it leaves the original debt unpaid. 2 *Pars. on Notes* 571-2; *Clute v. Small*, 17 *Wend.* 238.

A note of the party himself is not payment of his debt. Here the defendants owed the complainant this money upon their undertaking to pay it, and it was not paid by the giving of the note. Had the complainant willfully or fraudulently destroyed the note, he could not have recovered the debt for which it was given; but if destroyed by the mistake of himself or agent, it would not defeat him in recovering his original debt.

The only doubt in the case arises upon the jurisdiction of this court. The complainant might have recovered his debt at law, upon the view taken of the matter. But the act of Vanderbeck, which avoided the instrument, was done under misapprehension; and courts of equity have jurisdiction in all cases of mistake, and the discovery prayed by the bill was in some degree necessary to show the agreement and the mistake, and therefore the jurisdiction of this court may be sustained.

I am of opinion that the complainant is entitled to the relief sought, and that the defendants should be compelled to pay him the sum of \$551.64, with interest from October tenth, 1863, the time when they agreed to pay that sum to him.

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ABELS and others vs. McKEEN and GARRISON.

1. The contributors to a fund, raised and placed in the hands of trustees for a specific purpose, have a right to have any surplus not needed for the object, repaid to them, in proportion to their contributions. The claim is founded in equity, and will be enforced in this court.

2. The fund is in the control of the association, only for the purposes for which it was raised. It may be disposed of for any purpose within the object for which it was contributed, at any regular meeting of the association, by the voice of the majority of the members present, even if a minority of the whole number.

3. But the vote must be for some purpose for which the money was contributed. A majority cannot devote the money of the minority, or even of a single member, to any other purpose, without his consent.

4. So, surplus funds, contributed for enlisting men to fill the quota of a city or ward under a call of the President, and to clear the contributors from draft, cannot, by a vote of the majority, be donated to a charitable institution, without the consent of the minority.

5. All persons present at the meeting at which the vote is taken disposing of the fund, if no one dissents, are considered as voting with the majority for the motion, and assenting thereto; their right to the fund is concluded. *Aliter*, as to those not present.

6. Where, under a resolution of the majority, the surplus fund has passed into the hands of new trustees, between whom and the original contributors there is no priority, such trustees are not accountable to them for the fund; their remedy is against the original trustees only.

Mr. J. M. Scovel, for complainants.

Mr. Browning, for defendants.

THE CHANCELLOR.

This suit is brought by Abels, Nichuals, Ross, Murphy, Williams, Muldoon, Smoker, Paul, and Curlis, nine of the contributors to a fund raised by voluntary contribution, to free the north ward of the city of Camden from a draft, in the late rebellion. It is brought for themselves, and all of their associates, who should come in and contribute to the expenses of the suit. It is brought against the defendants

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McKeen and Garrison, to whom the excess of the fund raised by voluntary contribution, above the amount expended for the purpose for which it was raised, had been paid over by Vogel, the paymaster of the association.

In February, 1865, of the quota of sixty-six men allotted to the north ward of the city of Camden, on the call of President Lincoln, made in December previous, for three hundred thousand men, there remained fifty-six to be furnished. The quota had been sixty-two, and, according to the regulations, one hundred and twenty-six had been drafted to supply the deficiency. On the twenty-fifth of that month, a meeting was called at Hill's tavern, in that ward, to raise money for enlisting men to fill the quota, and release the men who had been drafted. They organized themselves into a society, and were called "the drafted men's association of north ward." A written article was drawn, to be subscribed, by which the subscribers agreed to pay the sums affixed to their names, for the purpose of filling the quota of north ward, in the city of Camden, under the last draft, and to exempt the drafted men; to be paid to Jesse Townsend, treasurer. This was dated February twenty-fifth, 1865, and was signed by thirty-one persons, among whom were the complainants, Nichuals, Muldoon, Paul, and Murphy. Others who did not subscribe to this agreement, contributed to the funds. The contributors were one hundred and eight in all, of whom seventy-nine were drafted men, and twenty-nine men not drafted. The amount contributed was \$8423, of which \$7326 was contributed by the drafted men, and \$1097 by others. Of this amount, \$3956.96 remained unexpended at the close of the war, after the quota had been filled, and when all danger of further draft had passed. This sum was paid by Vogel, the paymaster, to the defendants.

The association had its permanent president, treasurer, and secretary, and held its meetings at Hill's tavern, upon adjournment, and upon call, from February twenty-fifth until some time in June. At a meeting held on the seventh of March, a resolution was passed, without dissent, that after

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the number of men necessary to clear the contributors from that draft had been procured, if there was any overplus of the fund unexpended, it should be paid into the hands of the defendants, as the nucleus of a fund to release the ward from any future draft; and in case the war should cease, and there be no further draft, it should then be donated to some charitable institution of the city. On the sixth of April, 1865, Vogel, the paymaster, in whose hands the surplus was, on the faith of that resolution paid it over to the defendants, taking their receipt annexed to a copy of the resolution.

The defendants have appropriated this surplus to establish a city dispensary, which they claim that they were directed and authorized to do, by a vote of the association, at a meeting held on the sixth of April. The fact of such vote is disputed; the evidence is conflicting on the point, and the decided weight of evidence is against the fact that such vote was had.

The complainants named in the bill, are the only persons who can have the benefit of this suit. Whether, if any of their associates had offered to come in, make themselves parties, and contribute to the suit, they could have been admitted so to do, it is not necessary to decide, as none of them have been made parties, or applied for that purpose.

The claim of the complainants, that the contributors to a fund raised and placed in the hands of trustees for a specific purpose, have a right to have any surplus not needed for the object, repaid to them in proportion to their contributions, is a just claim, founded in equity, and will be enforced by this court.

The first question is, what power the meetings of the association had over this fund by vote of the majority of those present, and what effect the vote of March seventh had upon its application.

The fund, from the manner of its being raised and the organization of the association previous to its being raised, I think, was intended to be placed in the control of the association, for the purposes for which it was raised. That associa-

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tion, being without constitution or by-laws, from the necessity of the case must be held to have power to act at any regular meeting, by the voice of a majority of the members present. If, at such meeting, the fund had been disposed of for any purpose within the object for which it was raised, although it was by a bare majority of a meeting of a minority of the members, it would be binding on all the members. As in all partnerships or corporations, without articles, or charter, or by-laws, regulating it, a majority governs ; so, in an association governed by popular vote, in analogy to the established rule at popular elections, the control is in the majority of those who attend to their duty and exercise their right ; those voluntarily absenting themselves, are held as agreeing to the vote of the majority of the attending members or voters.

But as in partnerships and corporations the majority can only govern within the object for which the partnership or corporation was formed ; so here, that vote must be for some purpose for which the money was subscribed or contributed. That purpose was to free the north ward from draft, and the money of no contributor could be used for any other purpose, without his consent. A majority could not devote the money of the minority to establish a city dispensary, any more than they could have appropriated it to enlist men for the confederate army. Ninety-nine out of a hundred could not so apply the funds of the remaining one.

But five of the nine complainants, to wit, Muldoon, Paul, Nichuals, Murphy, and Smoker, were present at the meeting of March seventh. At such a meeting, if a vote is taken, and no one dissents, all who do not vote are considered as voting with the majority for the motion. And a vote of three ayes at a meeting of twenty, where no one dissents, is considered as the affirmative vote of all present. These five complainants, having thus assented to the payment of this money to the defendants, *to be donated* to a charity, have voluntarily abandoned all right to recover it themselves. Whether this resolution gave to the defendants the right to

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select the charity, is another question, which is not raised in this suit.

But this vote did not bind the four other complainants who were not present. Their right to the surplus of their contribution remains. The difficulty in the way of their recovering is of another kind, but is founded on the fact that they are not bound by the vote of March seventh. If they had authorized their treasurer, or paymaster, to pay their money to the defendants, and the defendants had accepted it upon that vote, it would have constituted them the agents of these complainants, and given them a right to call upon the defendants to appropriate this money rightly. But as it is, the defendants have no privity with these complainants. The assets they received were not the property or goods of these complainants, but money or assets which had never been theirs, handed over by Vogel, the treasurer of the association, under a vote of the association. If any one is accountable to them, it is Vogel, who handed over funds without authority from them, when he ought to have accounted to them for these funds. How far Vogel would be protected by such inference of acquiescence in the resolution of the majority as might be had from their silence for thirty days, will be settled if a suit is brought against him.

As against these defendants, the bill must be dismissed.

VANDEGRIFT *vs.* HERBERT.

1. In equity, a deed absolute on its face may be shown by parol to have been intended by the parties as security only for money advanced; and, in such case, as between the parties, it will be treated as a mortgage. But the proof in this cause, held not to show such intention.

2. The rule in equity is, that the responsive denial of an answer must be overcome by two witnesses, or evidence equivalent thereto.

3. The oaths of two complainants in the same cause, made by the statute competent witnesses for themselves, will not be considered as destroying

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the effect of the responsive denial of the answer, unless they seem to the court to be entitled to the weight of the oaths of two credible witnesses; and, in considering their weight, the fact of the interest of these witnesses as parties to the suit, must be taken into consideration.

This cause was heard upon bill, answer, and proofs.

Mr. P. S. Scovel and *Mr. Richey*, for complainant.

Mr. Cannon and *Mr. Hutchinson*, for defendant.

THE CHANCELLOR.

The bill in this case was filed by Josiah Vandegrift, to have a deed made by him and his wife to the defendant, William S. Herbert, dated August twenty-eighth, 1849, for a house and lot in Bordentown, declared a defeasible deed, given by way of mortgage to secure \$325, and to redeem the property.

Vandegrift, having died pending the suit, after he had been examined as a witness for himself, his wife, Hannah Vandegrift, to whom he had devised the property, was made complainant in his place, and the suit proceeded in her name.

The bill states that the complainant, being indebted to the estate of Joseph Hopkinson in the sum of \$300, for two years' rent, and, being sued for it, applied to the defendant who was the brother of his wife, to raise the money for him to settle that debt and the costs; that the defendant agreed to raise it for him, provided the complainant would convey to him his house and lot as security for the repayment of the amount; that it was agreed that he would convey the property as security, by a deed, which was to be a defeasible deed, and which was to be of no further effect, upon re-payment of the money advanced; that complainant and his wife executed the deed with the understanding that it was a defeasible deed, given only as security for the re-payment of the sum of \$325, to be advanced for the payment of said debt and costs, and for no other sum or debt whatever; that since the execution of the deed, the complainant has remained in posses-

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sion of the premises without paying any rent, and has paid the interest on the money yearly, and the taxes and insurance ; that he has built additions to the house and barn, at large expense, on the faith of the agreement ; that the deed was only a defeasible deed, given as security for the re-payment of the loan, and that he had tendered to the defendant the debt and interest, and applied for a re-conveyance, which the defendant refused.

The answer of the defendant denies, explicitly, that the conveyance was intended as security, or that it was understood to be defeasible, or that he agreed to re-convey the property. It sets forth that the complainant was indebted to Hopkinson's estate for \$125, for which suit had been brought, that two executions had been issued against his personal property on judgments in justices' courts, and other claims against him being pressed, he applied to the defendant, and offered to convey to him his house and lot, if he, the defendant, would pay his debts ; that upon inquiry into the amount of his debts, defendant agreed to do this, and that upon this agreement the conveyance was made, and was intended to be, as it was, an absolute conveyance ; that there was no agreement that it was defeasible, or that he should re-convey the property upon being paid the sum of \$325, or any other sum ; that to obtain part of the money necessary to pay the debts of the complainant, he mortgaged the property to Abner Woodward, for \$325, and that, to relieve the defendant and his wife, he, Herbert, agreed that they might remain on the property, if they would pay to Woodward the interest on the mortgage, and pay all taxes, and the amount necessary to keep the property insured ; that the additions put on were put on with his consent, and were paid for by complainant in consideration of the occupation of the property at a small and inadequate rent ; that the amount of complainant's debts was estimated by both parties at about \$400, the consideration inserted in the deed, but that they, in fact, amounted to \$447.13, which sum was actually paid by the defendant in their discharge. The answer fur-

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ther states, that the amount of the rent due to the Hopkinson estate, and paid by him, was \$125, with \$21 costs of suit; that the complainant owed Mrs. Hamilton \$100, which was secured by mortgage on the house and lot, which defendant paid off, with some interest due on it; and that he paid other debts, which he specifies, to the amount stated. He denies that the complainant has paid all the interest, taxes, and insurance, and alleges that the same were paid in part by him. And, while he denies that the deed was intended or understood to be defeasible, or as security only, he says that he has always been willing, and is now willing, to convey the property to the complainant, upon being repaid what he has advanced for his debts, taxes, and insurance, with interest thereon, and admits the charge in the bill, that he has declared to divers persons that he would do so.

The answer is a full and explicit denial of the whole equity on which the bill is founded; it denies that the deed was intended or understood as security only, either for the sum of \$325, and interest, or for any other sum; but that it was, and was intended to be, an absolute conveyance of the property.

There is no question but that, in equity, a deed absolute on its face may be shown by parol to have been intended by the parties as security only for money advanced, and that in such case, as between the parties, it will be treated as a mortgage.

The question here is upon the proof.

The rule in equity is, that the responsive denial of an answer must prevail unless overcome by the testimony of two witnesses, or evidence equivalent thereto. The complainant appeals to the conscience of the defendant, and compels him to be a witness against himself. He is not allowed to impeach the credibility of the defendant, but must overcome his answer by stronger evidence.

In this case, there are two witnesses. Josiah Vandegrift, the original complainant, testified in his life; his death made his wife, the present complainant, a competent witness for herself. But although the statute made both successively

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competent witnesses for themselves, it leaves the credibility to be judged of as affected by their interest. Their oaths are not legally entitled to be considered as destroying the effect of the answer, unless they seem to the court to be entitled to the weight of the oaths of two credible witnesses; and in considering their weight, the fact of the interest of these witnesses as parties to the suit, must be taken into consideration, while the effect given to a responsive answer is arbitrarily fixed, without reference to the interest of the defendant.

The objection to the evidence of Mrs. Vandegrift, that she was sworn after the complainant's testimony had closed, and to sustain the main issue, and not to rebut the evidence of the defendant, will not, in this court, exclude her testimony as incompetent; it can only affect its credibility. The interest of both these parties, when sworn, was of a nature that makes it proper to scrutinize their testimony with great care; and they are the only direct witnesses to prove the case made by the bill and denied by the answer.

Their testimony shows a case essentially different from that stated in the bill. The difference is not of the kind that would defeat the title to relief on account of variance, but it must destroy all confidence in the accuracy of their recollections: The bill was sworn to by Josiah Vandegrift; and Mrs. Vandegrift testifies that she furnished the facts to the solicitor who drew it. No decree ought to be based upon the evidence of witnesses who show such want of recollection of the most important facts, in a transaction in which all their property was at stake, and in which everything was trusted to memory. This testimony is not sufficient to overcome either the answer or the evidence of the defendant.

The circumstances and admissions of the defendant, relied upon in corroboration of their evidence, may show that there was some understanding of the parties, which may have been implied from their relative situation and the circumstances under which the conveyance was made, that the defendant would re-convey the property upon being repaid what he had

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advanced, with interest; but they do not prove or confirm the case set up by the complainant in the bill and evidence, that he was to re-convey on being paid \$325.

I am convinced, from the answer and the evidence, that there was no agreement that this deed should be considered a defeasible deed, or security merely for the re-payment of the sum advanced, or to be advanced. I am also satisfied, from the answer and evidence, and from the relation and situation of the parties at the time, that it was understood between them, probably without any express agreement to that effect, that the defendant would, at any time, re-convey the property upon being reimbursed the amount paid out by him, with interest; and that, on the faith of this understanding, with the knowledge and assent of the defendant, Vandegrift built the additions to the house and barn, and that the defendant assented to, and permitted these improvements, and the necessary outlay therefor, with that understanding on his part, as well as on the part of Vandegrift. The whole conduct of the parties, the occupation of the property, as well as the admissions to Hankins and Wood, show that there must have been some such understanding. These admissions and the attending circumstances, although they might satisfy me that there was *some* understanding between the parties, would not show the terms upon which the re-conveyance was to be made, a fact necessary to any relief by this court, either in the form of declaring the deed to have been given as a mortgage, or of decreeing a conveyance in specific performance of a contract in part performed. But the answer relieves from all difficulty on this head; the defendant alleges that he has always been willing, and is now willing, to re-convey the property upon being re-paid the sum of \$447.13, advanced by him to pay the debts of the complainant, Josiah Vandegrift, which he alleges was the real consideration of the conveyance to him, with the interest thereon, and the amounts paid by him for insurance and taxes. The evidence shows satisfactorily that he paid about that amount in discharge of the debts of Vandegrift; and no agreement or un-

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derstanding can be inferred from the evidence, outside of that of Vandegrift and his wife, that a re-conveyance was to be made for anything less than a full re-payment of all that he had advanced, with interest.

I think it satisfactorily appears that the interest on \$325, the part of his advances which the defendant borrowed on mortgage, was paid by Vandegrift until April first, 1863, and that he paid taxes and insurance, so far as insurance was paid, until that time.

The defendant is entitled to have the sum of \$447.13, with interest on \$122.13, from August twenty-eighth, 1849, to April first, 1863, and from that time with interest on the whole sum of \$447.13, and also all taxes and insurance premiums that he may have paid since the last mentioned day, with interest thereon, repaid to him; and upon such payment, he must convey to the complainant, Hannah Vandegrift, in fee, free from all encumbrances created by him, the property in question. And the complainant must pay to the defendant his costs.

QUIDORT'S ADMINISTRATOR vs. PERGEAUX and wife.*

1. Evidence to show that an alleged intestate left a will, and that therefore the grant of administration was unlawful and void, cannot be received in a suit in this court.

2. The grant of administration constitutes the person to whom it is granted the administrator, whether rightfully or wrongly granted, and cannot be inquired into in this court, collaterally.

3. The acts of the surrogate can only be reviewed by appeal to the Orphans Court or Prerogative Court. They cannot be impeached collaterally. The only question that can be made is, whether he had jurisdiction.

4. If the supposed intestate is not dead, or if letters lawfully granted to some one else are in existence, the grant is void.

5. A deed taken in the name of the wife, for property purchased with her separate estate, is no fraud upon creditors, even if taking title in her name was to avoid any claim by judgment against her husband for debts which he then owed.

*CITED in *Bank v. Sprague*, 5 C. E. Gr. 25; *M'f'g Co. v. Hummell*, 10 C. E. Gr. 47; *Beal's Ex'r v. Storm*, 11 C. E. Gr. 377; *Ryno's Ex'r v. Ryno's Adm'r*, 12 C. E. Gr. 524; *Paterson v. Mulford*, 7 Vr. 488.

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6. But where the balance of the purchase money for such property, was paid out of the earnings of a business carried on in the name of the wife, but to which his skill and labor largely contributed, such property will be decreed to be held by the wife in trust for his creditors, subject to her claim for the money advanced out of her separate estate.

7. A husband may, as against his creditors, allow his wife to have for her separate use, the earnings of herself and of the labor of their minor children, but he may not give to her to be invested in her own name, the proceeds of his own business, skill, and labor.

8. The law was intended to protect the property and earnings of the wife, and not those of the husband against his creditors. And when they mix them so that they cannot be separated, the husband cannot make a distinct gift to his wife of her own earnings, and they remain as at common law, his property.

The cause was argued on the pleadings and proofs.

Mr. J. P. Jackson, for complainant.

1. As to the demurrer contained in the answer, we contend that the supplemental proceedings authorized by the act to prevent fraudulent trusts and assignments, do not deprive the Court of Chancery of its jurisdiction over cases of this kind. Any other conclusion than this, would render the court liable to be shorn of much of its original jurisdiction, by the new and cumulative statutory remedies which the legislature proposes for modern convenience. 1 *Story's Eq. Jur.*, § 64 i, 80; *Cook v. Johnson*, 1 *Beas.* 54.

2. This court will come to the aid of a judgment creditor who has exhausted his legal remedies, and assist him by way of discovering his debtor's assets, or of applying property held in trust, or fraudulently, to the discharge of the debt. *Disborough v. Outcalt*, *Saxt.* 298; *Brown v. Fuller*, 2 *Beas.* 271.

3. We contend that the title to the property in question is fraudulently held by the wife, and really belongs to the husband.

4. In any event, all the money paid on the property since the time of purchase, was derived from the earnings of *Pergeaux* and wife, and therefore, all belongs to him.

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The business (that of restaurant and wine saloon) was his business; the licenses required by the U. S. Government and city of Newark, were taken in his name; the nature of the business is such as a woman cannot well manage, and the evidence shows that the husband did most, and almost all, of the work.

In such a case, the earnings of a wife clearly belong to the husband; and their joint earnings, paid on account in the purchase of lands, even when the title is taken in her name, will be traced out, and applied to satisfy his creditors. *Skillman v. Skillman*, 2 *Beas.* 403; *Johnson v. Vail*, 1 *McCarter* 423; *Avery v. Doane*, 3 *Am. Law Reg.* (February, 1855) 229; *Lovett v. Robinson*, 7 *Howard's Prac. R.* 105; *Raybold v. Raybold*, 8 *Harris* 308; *Woodbeck v. Hewens*, 4 *Am. Law Reg. (N. S.)* 121; *Parvin v. Copewell*, 3 *Am. Law Reg. (N. S.)* 575.

Mr. Borchering, for defendants.

1. The complainant is not entitled to relief in this court, until he has exhausted his remedy at law. *Act to prevent Fraudulent Trusts and Assignments*, (*Nix. Dig.* 271,) and supplements.

2. The existence of a will having been proven, complainant has no standing in court, unless he shows that he was appointed by the court as administrator *oum testamento annexo*.

3. The charge of fraud alleged against defendant, Maria Marguerite, is merely inferred, and the testimony in the cause shows nothing, that she was either directly or indirectly possessed of any knowledge thereof, if any fraud was practiced; she acted in good faith, and the act of New Jersey, securing the property of married women, protects her. *Nix. Dig.* 503.

Fraud cannot be presumed; it must be established by proof. 1 *Story's Eq. Jur.*, § 190.

4. The defendant, M. M., should not have been made a party to this cause *simply* upon the presumption of fraud, and thereby

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endeavoring to avoid the reception of her testimony. Courts of equity will liberally construe acts for benefit of married women. A married woman may be barred from testifying in favor of her husband, but in this case she was wrongfully made party, and is entitled to the right to protect her estate.

5. Even if Pergeaux had declared that the premises were his property, either by advertisement or verbally, such declarations cannot affect the wife's separate estate. *Bradstreet v. Pratt*, 17 *Wend.* 44; *Stuart v. Kissam*, 2 *Barb. S. C. R.* 493.

6. The wife, in equity, will be protected, not only against the husband but against his assignees, although for value; and against any sale made, or lien created by the husband, although for value, or in payment of a just debt. 1 *Vern.* 7, 18; 1 *P. W.* 382, 458; 2 *P. W.* 608; 2 *Atk.* 207, 417; 2 *Dick.* 491; 4 *Bro. C. C.* 326; *Burdon v. Dean*, 2 *Ves.* 607; *Like v. Beresford*, 3 *Ves.* 506; *Macaulay v. Phillips*, 4 *Ves.* 19; *Franco v. Franco*, *Ibid.* 515; *Wright v. Morley* 11 *Ves.* 12; *Johnson v. Johnson*, *Jac. & W.* 456; *Ex parte Beresford*, 1 *Dess.* 263; *Howard v. Moffatt*, 2 *Johns. C. R.* 206; *Haviland v. Myers*, 6 *Johns. C. R.* 25, 178; *Munford v. Murray*, 1 *Paige* 620; *Van Epps v. Van Deusen*, 4 *Paige* 64.

She will be protected as superior to the lien of a judgment creditor, requiring the aid of a court of equity. *Sleight v. Read*, 18 *Barb. S. C. R.* 159; *Smith v. Kane*, 2 *Paige* 303; *Haviland v. Bloom*, 6 *Johns. C. R.* 178; *Howard v. Moffatt*, 2 *Johns. C. R.* 206; *Van Duzer v. Van Duzer*, 6 *Paige* 366; *Taggard v. Talcott*, 2 *Edw. C. R.* 628; *Danforth v. Woods*, 11 *Paige* 9; *Shirley v. Shirley*, 9 *Ibid.* 363; 2 *Story's Eq. Jur.*, § 1385-7.

7. In this case the husband and wife treated the original purchase of the real estate, and the personal property used in and about the business, carried on by the wife, as the *property of the wife*, from the time of such purchase.

The husband never interfered or meddled with the wife's property.

Constant Pergeaux had a partner in business in another

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part of the city, where they carried on a separate business, and by whom the debt under which complainant claims, was contracted.

No part of the goods purchased for which that debt remains unpaid, ever went into the possession of the wife; nor did she receive any proceeds derived therefrom. Under the evidence in this cause, the defendant, M. Marguerite, is entitled to a decree that the real and personal property in question, being purchased with her separate property and the issues and profits arising from the same, belong to her as her separate estate, and are not liable to creditors of her husband, for debts contracted by him without her knowledge or consent, and over which she could not exercise any control.

THE CHANCELLOR.

The complainant, as administrator of Quidort, in October, 1865, recovered in the Essex County Circuit Court, a judgment against the defendant, Constant Y. Pergeaux, for \$573. The execution issued on this judgment, was returned wholly unsatisfied; and the complainant filed his bill in this court against the defendants, C. Y. Pergeaux and Martha Marguerite, his wife, charging that the premises known as No. 52 Mechanic street, in the city of Newark, which had been conveyed to said Maria Pergeaux, by Martin B. Clinchard, by deed dated August first, 1860, were the property of her husband, and had been bought and paid for with his money, and were held by her for the benefit of her husband, and to aid him in defrauding his creditors; and praying that these premises may be declared to be held in trust for the complainant, and other creditors of Pergeaux, and may be sold for the purpose of paying the judgment of the complainant.

The defendants deny the fraud and the trust, and answer that the premises were bought and paid for by the defendant, Maria Pergeaux, in her own name, for her own use, and with money of her own separate estate.

There are two preliminary questions as to evidence. The defendants offered evidence to show that Quidort left a will,

Rogers v. Rogers.

Mr. Gage, for complainant.

THE CHANCELLOR.

In this case, the only adultery charged, is that with divers persons unknown to the complainant. Apart from the proof, no divorce can be granted on such bill. The adultery charged, must be designated either by the name of the adulterer, or by circumstances, and the time when, and place where, it was committed. Charging a woman with being an adulteress generally, is not sufficient. *Marsh v. Marsh* 1 C. E. Green 391.

If this objection to the pleading had no foundation, the proof fails. The charge is of adultery with *divers* persons, whose names were unknown. The proof, and only proof, is of adultery with one Joshua H. Butterworth, whose person and name were well known to the complainant, as appears by the evidence.

The bill must be dismissed, without prejudice as to filing a new bill for adultery with Joshua H. Butterworth.

ROGERS vs. ROGERS.*

1. The publication and service of the order upon an absent defendant, instead of a notice, as required by Rule 145, after May first, 1867, is a formal objection; in this case it was waived upon the production of additional proof to remove substantial objections.

2. It must clearly appear that the notice was sent to the defendant's post office address. That the solicitor was informed that the address to which it was sent was the defendant's address, without stating the source of information, or that he was *credibly* informed, and "verily" believes, is not sufficient.

3. Absence from the wife for three years, is not necessarily desertion in the legal sense of the term. The circumstances and manner of the desertion must be shown, that the court may determine the intent.

* CITED in *Dinsmore v. Westcott*, 10 C. E. Gr. 304; *Tate v. Tate*, 11 C. E. Gr. 56.

Rogers v. Rogers.

The petitioner filed her petition in this court for a divorce, on the ground of desertion ; her husband having left her, and absented himself for three years. It appearing by affidavit, that the husband was out of the state, she took an order of publication. A copy of this order, instead of the notice required by Rule 145, was sent to Charleston. An affidavit was filed by the solicitor, stating that he had been "informed" that Charleston was his post office address. The circumstances and manner of the desertion did not appear.

Mr. Mockridge, for petitioner, *ex parte*.

THE CHANCELLOR.

1. The publication and service is of the order, and not of a notice, as required by Rule 145, after May first, 1867.

2. The notice was sent to Charleston, but it does not sufficiently appear that this was defendant's post office address. The fact that the solicitor was so informed, without stating the source of information, or that he was *credibly* informed, and "verily" believed, is not sufficient.

3. It is clearly proved that defendant left his wife and stayed away three years.

These facts may exist, and yet there be no desertion in the legal sense of the term. Many of our naval officers are off on a three years' cruise. This is no cause of divorce.

The circumstances and manner of the desertion must be shown, that the court, and not the witnesses, may determine whether the defendant intended to abandon his wife, and when such abandonment commenced.

If the second and third grounds of refusal are removed by additional proof, the first, being merely formal, will be waived.

Stevens v. Wilson.

STEVENS vs. WILSON.*

Upon a bill filed to compel a transfer of two hundred shares of stock, purchased by the defendant, with money advanced by the complainant upon the following order, viz., "Please pay to order of D. M. W. \$5000, for which he will give you a receipt, to be paid in stock of the Newark Plank Road Co., say two hundred shares, or money return in same proportion, at that rate, \$25 per share;" held, that the meaning of the contract was, that if the defendant could not, or did not buy the stock at par, he should return the money; that when he purchased the stock with complainant's money, he held it as trustee for complainant; and that he must transfer the stock to the complainant, and account for all the dividends, with interest.

The cause was argued upon the bill and answer.

Mr. T. Runyon, for complainant.

Mr. Keasbey, for defendant.

THE CHANCELLOR.

The defendant, in April, 1860, was president, and a director of the Newark Plank Road Company, and held some of its stock. The New Jersey Railroad Company were buying up stock of this company for the purpose of obtaining the control of it; the defendant was interested in keeping the majority of the stock and the control of the company out of their hands. He applied to the complainant, who, on account of his interest in a rival scheme, wished to keep the plank road out of the control of the railroad company, to aid him in buying up and holding the stock. The complainant did not desire the plank road stock as an investment, but was desirous to aid the defendant in accomplishing his design of keeping the control out of the hands of the New Jersey Railroad Company, and agreed to advance \$5000 for that purpose. The money was advanced on the twenty-eighth

* CITED in *Cutting v. Dana*, 10 C. E. Gr. 270.

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of April, 1860, by an order given by Stevens upon his agent, W. W. Shippen. This order and the receipt of Wilson annexed, the defendant in his answer says, contain the terms on which the money was advanced, and the mode in which it was to be disposed of. The order and receipt, as set forth in the answer, are as follows :

“HOBOKEN, April 28th, 1860.

W. W. SHIPPEN, ESQ., Sir :—Please pay to order D. M. Wilson \$5000, for which he will give you a receipt, to be paid in stock of the Newark Plank Road Co., say two hundred shares, or money return in same proportion, at that rate, \$25 per share.

E. A. STEVENS.”

“Received, Hoboken, April 28th, 1860, \$5000, as per stipulation within, to be transferred to order or request of Mr. Stevens, when he shall desire.

D. M. WILSON.”

The defendant, upon receiving the money, purchased with it two hundred shares of the stock of the plank road company, which he caused to be transferred to himself, and still holds, having since received all the dividends thereon, commencing with the dividend of July first, 1860.

About two years after the purchase, the complainant requested the defendant to transfer the stock to him. Wilson declined to do this, saying that he supposed Mr. Stevens never intended to ask him for the stock, or the money; and afterwards, the complainant, by a written notice, required the transfer, and upon refusal, filed his bill in this case to compel the transfer.

The defendant contends that, by the terms of the contract in the papers, and by the understanding between him and complainant, he was, at his option, to return either the stock, or the money with the interest, and offers to pay the money, with the interest.

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The question is upon the meaning of the contract, as contained in the writings. Whether this is such a contract as will merge in the writings all the verbal understanding and conversation at and before the making of it, need not be considered here, for the answer says it contains the terms of the agreement, and although it states what was their understanding of the contract, it does not state any conversation or verbal agreement in which that understanding was embodied; so we can only infer that such understanding means the interpretation of the agreement.

The order is in the curt, elliptical form, used by business men, and is not entirely free from ambiguity, and must be interpreted by the circumstances under which it was given.

The complainant did not desire to own or hold plank road stock, but did desire to aid the defendant in retaining the control of the road, and was willing to advance the money and risk it in stock at par, and to stand the loss if it depreciated; he was not willing, or, at least, did not agree to pay, over par.

The defendant wanted the aid of the complainant in precisely that way; he wanted Stevens to aid in controlling the direction of the road, by advancing money to buy stock, at his own risk. He did not want a loan of money to enable himself to buy stock, at his risk. He, for aught that appears, was a capitalist, able to buy without borrowing, or to borrow of the banks. He appealed to Stevens' spirit of rivalry to the New Jersey road, and not to his own credit. Nor was his object to make personal gain by having the stock in such position that he should have the advantage of the rise, and Stevens run the risk of depreciation. He did not, and, from the circumstances, it is plain that he would not make such a proposition; it would have defeated his object.

Under these circumstances, and the additional fact, which must be taken for granted, that it was possible that he might not be able to purchase the shares at the price limited, this money was advanced. And, under such circumstances, although the complainant possibly might agree that

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the defendant should buy the shares, and return them or the money to him, at his option, after he ascertained which would be most profitable for himself, an agreement so inequitable will not be inferred from doubtful terms; it must clearly appear.

The terms of the receipt are to pay in stock, or return the money; the expression "or money return," can mean nothing else; it is not *to repay* in money, but *to return* the money, and of this, the natural meaning would be, that he should return the same money, not the same identical coin or bills, but the money without having used it; this is strengthened by the fact that interest is not mentioned. If it was meant that he should hold the stock two or five years, and then at his option, transfer the stock or repay the money, it would have been with interest.

The contract means that if he could not, or did not buy the stock at par, he should return the money; one of these was to be done. When he purchased the stock with Stevens' money, according to the rule of equity, he held that stock as trustee for Stevens, and nothing but a clear, positive agreement by Stevens, will enable him to speculate on the trust property for his own benefit, and at his option, to appropriate the profits, and put the risks upon his *cestui que trust*.

The terms of the receipt, "to be transferred to the order of Mr. Stevens *when* he shall desire," show plainly that it was intended that the stock itself, if well purchased, should be held for him, and transferred when he requested. He did not wish to appear as the owner of the stock; he had a reason for having it in the name of another, but by this he secured the right of having it transferred to any other person than the defendant, at his option.

The defendant must transfer to the complainant these two hundred shares of stock, and account for all the dividends received upon them, with interest.

Harrison v. Stewart.

HARRISON vs. STEWART.*

A mortgage executed by a married woman, as a *feme sole*, she living apart from her husband, upon her separate property, to secure a debt contracted by her and for her benefit, is a valid lien upon such property.

The cause was argued on bill, answer, and proofs.

Mr. J. W. Taylor, for complainant.

Mr. Vanatta, for defendant.

THE CHANCELLOR.

The bill is filed to foreclose a mortgage given by the defendant, Sarah L. Stewart. She was a married woman, living separate from her husband, and made a mortgage upon her own real estate that had been conveyed to her during separation. She gave a bond and mortgage to the complainant, as if she was a *feme sole*. The complainant did not know that she had a husband living at the time. The consideration of the mortgage was the surrendering and canceling another mortgage on the lands, held by the complainant.

The mortgage and bond, being given by a married woman, without her husband, and without an acknowledgment proper in such case, are both void. The mortgage cannot be foreclosed, nor any remedy had on it. But the debt was contracted by the defendant when married, for the benefit and advantage of her separate estate; and she had power to charge her separate estate with the payment of it, and such charge will be enforced in equity. *Wilson v. Brown*, 2 *Beas.* 277.

In this case it appears that the debt was contracted for the benefit of her separate estate; giving up a mortgage on it was for her advantage, and is a sufficient consideration. The defendant, by attempting to execute a new mortgage,

* CITED in *Cutler v. Tuttle*, 4 C. E. Gr. 560; *Armstrong v. Ross*, 5 C. E. Gr. 116; *Perkins v. Elliott*, 7 C. E. Gr. 128; *Ferry v. Laible*, 12 C. E. Gr. 150.

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plainly showed her intention to charge her separate property with the debt.

The facts set forth in the bill will warrant this relief. Although the special prayer of the bill is for a foreclosure, and sale of the premises, yet the general prayer for relief will entitle to any relief that is warranted by the facts in the bill.

The complainant is entitled to have his debt made a lien on her separate property, and have that sold for the payment thereof.

The agreement to pay seven per cent. is sufficiently proved ; it needs no further consideration than that. The mortgage was, by mistake, drawn at six per cent. ; her note acknowledged the mistake, and agreed to pay seven. The interest must be computed at seven per cent.

STEINBERGER'S TRUSTEES vs. POTTER.

1. A marriage settlement, by which an intended wife conveyed to trustees, all property which she then had, and *to which she might thereafter become entitled, &c.*, does not, at law, convey the after acquired property. Equity will construe such instrument as a contract to convey, and enforce its performance, only when necessary to effect the plain intent of the parties.

2. Such settlement construed as an agreement to convey only such property as the wife might acquire *during marriage*.

Mr. Parker and *Mr. Keasbey*, for complainants.

Mr. Williamson, for defendants.

THE CHANCELLOR.

The suit is by Gordon and Potter, trustees under a marriage settlement, against Alice B. Potter, and her infant son, James Potter. The defendant, Alice B. Potter, then Alice B. Steinberger, on the twenty-second of July, 1863, being about to contract a marriage with John Hamilton Potter,

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entered into a marriage contract between herself, of the first part; her intended husband, of the second part; and the complainants, as trustees, of the third part. By it, she conveyed to the trustees all the property she might then be entitled to, under the will of her grandfather, or otherwise, and all property *to which she might thereafter become entitled*, in trust for her use during her natural life, and after her decease to the use of her husband during his life, and after the death of the survivor, to the use of her children, in fee; and if she died without issue, to such persons as she might, by will, appoint; and in default of both appointment and issue, to her next of kin, in fee; with a covenant by her husband, to join in any conveyance necessary to assure such property to the trustees.

After the marriage and the birth of one child, the defendant James Potter, the husband died intestate, leaving large real and personal estates.

The object of the suit is to have the share of Alice Potter in her deceased husband's estate, conveyed to the complainants as trustees under the marriage settlement, for the purposes of the settlement.

The articles of settlement do not, at law, convey to the trustees the after acquired property; and if they are entitled to have it conveyed, this court should give the relief prayed for.

I think the only intention and object of this contract was to secure to the defendant, Alice, during coverture, and to her husband for life, if he survived her, and to her children after her death, such property as she then had, and might acquire *during marriage*. It is true that, by the words of the instrument, all property she might at any time after its date become entitled to, is conveyed. But this instrument is not an agreement by her, to convey; and the only manner in which a court of equity will give effect to such instrument, which, at law, does not convey after acquired property, is by considering it as a contract to convey, and enforcing the performance of that contract. Marriage is a valuable considera-

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tion, and the issue, represented here by the complainants, are within that consideration, and if necessary to effect the plain intent of the parties declared by the instrument, this court will consider it a contract.

But as the instrument contains no agreement to convey, the court will not construe it into such an agreement, for the conveyance of property that may devolve upon the defendant at or after the termination of the marriage. Such was not the express, or the presumed object of such a contract. If such construction were given to it, any and all property to which she might become entitled for her whole life, if it extended to seventy years, and the estates amounted to millions of money, must be conveyed to these trustees, and be held in trust for her life, with no possibility of her enjoying the principal; it would include property acquired by any future marriage. For such purpose, a court of equity will not convert an inoperative conveyance into a contract to convey, and defeat, instead of carrying into effect, the object of the parties.

The relief prayed for must be denied.

COWART vs. PERRINE.

1. The statute of limitations is a bar in equity, to an account between partners.

2. A submission to arbitrators, of partnership affairs, without limit as to time, cannot keep any claim that might have been included in the submission, alive for the purpose of a suit indefinitely.

This was a motion to strike out the plea filed by defendant, as improper, and improperly pleaded. One of the grounds of the motion was, that the plea was not properly sworn to, as required by the statute. This ground was waived by a consent to amend the plea in that particular, and the motion was, by consent, then argued upon the sufficiency of the plea as a defence in this case.

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Mr. W. H. Vredenburg, in support of the motion.

Plea is not *formally* pleaded as required by our statute. *Nix. Dig.* 107, § 86.

Even if formally pleaded, it is not a good plea in this suit. The statute of limitations does not apply to accounts between merchant and merchant. *Nix. Dig.* 469-70, § 8. Nor between partners. See opinion of Kent in *Ray v. Bogart*, 2 *Johns. Cas.* 436; *Coster v. Murray*, 5 *Johns. C. R.* 524-5; *Catlin v. Skoulding*, 6 *Term* 189; *Sandys v. Bladwell*, Sir Wm. Jones 401; *Foster v. Hodgson*, 19 *Ves.* 180.

The claim contained in the bill related to the *execution of a trust*, and therefore, was not within the statute. *Wanmaker v. Van Buskirk*, *Saxt.* 685; *Allen's Adm'r v. Woolley's Ex'rs*, 1 *Green's C. R.* 209; *Decouche v. Savetier* 3 *Johns. C. R.* 216; *Goodrich v. Pendleton*, *Ibid.* 387; *Coster v. Murray*, 5 *Johns. C. R.* 531; *Obert v. Obert*, 1 *Beas.* 430; *Lawly v. Lawly*, 9 *Mod.* 32.

The distinction in case of *Kane v. Bloodgood*, 7 *Johns. C. R.* 90, is, that the trusts intended by the courts of equity not to be reached or affected by the statute of limitations, are those technical and continuing trusts, which *are not at all cognizable at law*, but fall within the proper, peculiar, and *exclusive* jurisdiction of this court.

Partners are *trustees* for each other, and *there is no compulsory remedy at law* between them.

Statute does not apply to joint tenants or parceners. *Prince v. Heylin*, 1 *Atk.* 493.

Six years next after cause of action accrued to complainant, has not elapsed. A pure plea of the statute is no bar where there are circumstances stated in the bill which take the case out of it. *Kane v. Bloodgood*, 7 *Johns. C. R.* 133, and cases there cited.

The complainant had no right of action after the agreement to refer to arbitrators in 1853, until notice was given him that arbitrators refused to act.

The reference to the arbitrators suspended the right of action to both parties during its continuance. The notice

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from arbitrators as stated in bill, was not served on complainant until within six years before the commencement of the action.

Neither party had a right to bring suit against the other while arbitration was unfinished.

It is well settled, that plea *admits* all the facts alleged in bill, which it does not expressly controvert.

The articles of arbitration was a *new promise and agreement*, and that neither party can take advantage of it to bar any rights lost through its continuance. *Beams' Pleas* 169; *Pomfret v. Windsor*, 2 *Ves.*, *sen.*, 485; *Andrews v. Brown*, *Prec. in Chan.* 385; *Baillie v. Sibbald*, 15 *Ves.* 185; *Barrington v. O'Brien*, 1 *Ball & B.* 178.

In the last case considered a *fraud* by one party to persuade the other not to prosecute, by holding out promises until the debt is barred by the statute.

The complainant had every reason to believe the arbitrators would act, until notified by them to the contrary, and *he has brought his suit within six years after such notification*. Will this court turn him out remediless?

We submit that plea is neither formally, nor in substance, a good plea, and ought to be overruled.

Mr. P. D. Vroom, contra.

THE CHANCELLOR.

The bill was filed by the complainant, to compel the defendant to account for the affairs of a partnership, formerly existing between them, which was terminated in 1853. The agreement to dissolve, contained a provision to submit all matters in difference, which should arise between them, to two arbitrators named. The bill alleged that the arbitrators were convened in January, 1860, to settle difficulties between them; that the defendant, under the pretence of it being necessary to go to New York, refused to proceed, and left the arbitrators, agreeing to appear and proceed before them

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in March, then next, but refused and neglected to appear and proceed then, or at any other time; and that, in consequence of his refusal, the arbitrators, by a writing duly executed by them, on the sixth day of July, 1861, and in thirty days afterwards served on the defendant, declined to act further between the parties. The bill was filed on the fifth day of July, 1867.

The defendant pleaded that he had not become liable to account, or to the action, or on any promise, within six years, and that the action was barred by the statute of limitations; and by an answer annexed, in support of the plea, admitting the submission and meeting before the arbitrators in January, 1860, denied that he promised to appear before them in March of that year, or at any other time, and also denied that he was afterwards requested to appear before the arbitrators.

It is well settled, that the statute of limitations is a bar to suits in equity in all cases in which it would bar the same suits at law. The only exceptions are, when the suit concerns a trust, or a subject of pure equity cognizance that could not be entertained in the courts of law. 1 *Daniell's Chan. Prac.* 664; *Angell on Limitations*, §§ 25 to 30; *Mitford's Eq. Pl.* 269; *Story's Eq. Pl.*, § 751; *Wanmaker's Ex'rs v. Van Buskirk*, *Saxt.* 685; *Allen's Adm'r v. Woolley's Ex'rs*, 1 *Green's C. R.* 209; *Dean v. Dean*, 1 *Stockt.* 425.

The statute of limitations expressly includes actions of account, which will lie at law or in equity between partners, and the statute is therefore held to be a bar in equity, to an account, and to an account between partners. *Angell on Limitations*, § 27; *Collyer on Part.*, § 374-5-6; *Barber v. Barber*, 18 *Ves.* 286; *Tatam v. Williams*, 3 *Hare* 355; *Atwater v. Fowler*, 1 *Edw. C. R.* 423.

The only question then is, whether any facts averred in the bill, and not denied in the answer in support of the plea, will take the case out of the statute, and avoid the bar.

The only matter that is relied on, is the submission to arbitrators contained in the articles of dissolution, and the

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fact that this submission was not terminated until July sixth, 1860. The answer denies that anything was done by the arbitrators from 1853 until 1860, and denies that defendant then agreed to appear before them again, or that he was ever after that requested to appear.

The appearance before the arbitrators in January, 1860, might possibly be considered an admission that there was something unsettled at that time; but as it is not necessary to decide this, no opinion is given upon it. But from that day until the filing of the bill, there is nothing which can be construed into an admission that there was any debt or unsettled account.

An agreement to submit all disputes to arbitrators, provided they should make their award within two years, would not prevent the statute from running during those two years, if nothing whatever was done by the defendant or arbitrators within those two years; nor can a submission, without limit as to time, have the effect of keeping any claim that might have been included in the submission, alive for the purpose of a suit for an indefinite time.

I am of opinion that the statute of limitations is a good bar to this suit; and that, taking for true every fact alleged in the bill, not denied by the answer annexed to the plea, which is the rule in such case, there is nothing to prevent the plea being a bar to the relief prayed for by this bill.

The motion to strike out must be denied. The complainant may still, if he chooses, reply to, and take issue upon it.

Lewis v. Schenck and Smith.

LEWIS vs. SCHENCK and SMITH.*

1. A material alteration of a note by the payee, without fraudulent intent, though it avoids the note, does not deprive him of his right to recover the original debt.

2. In such case, the action for the recovery of the debt should be brought at law. But the alteration being made under misapprehension, and the discovery prayed by the bill being in some decree necessary to show the agreement and the mistake, jurisdiction of this case sustained.

Mr. Linn, for complainant.

Mr. J. V. Voorhees, for defendants.

THE CHANCELLOR.

On the seventh day of February, 1863, Henry A. Herder, sheriff of Somerset, sold a farm of the defendant, Schenck, by virtue of several executions in his hands; one of these was in favor of the complainant, Lewis, and there was due on it \$551.64, besides costs. Before the sale, Schenck represented to Vanderbeck, the agent of Lewis, who was not present, but at his home, in Ohio, that the defendant, Smith, would buy in the farm for him, and requested Vanderbeck to give him eight months' time to pay Lewis' claim, for which he and Smith would be responsible. Vanderbeck agreed to this, and Schenck and Smith agreed with Vanderbeck that they would pay Lewis his claim in eight months, and give their note, payable at bank, for the amount. The property was sold by the sheriff to Smith for \$11,051, being the full amount of the claims in the sheriff's hands, including all costs and expenses. After the sale, on the same day, Schenck and Smith made their joint and several note to Lewis for \$551.64, payable to him or bearer at eight months from date, and gave it to Vanderbeck, who thereupon gave the sheriff a receipt for the execution debt of Lewis. The sheriff afterwards delivered the deed to Smith, without any

* CITED in *Hunt v. Gray*, 6 Vr. 234.

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further payment of the judgment of Lewis; this note, or rather Vanderbeck's receipt, being taken by him as payment of that claim. Vanderbeck, on the day of the sale, after Schenck and Smith had left, had some conversation with the sheriff about the note, and the fact that it did not include interest for the eight months, which both supposed it ought to have included. He supposed that such was the understanding, and that the omission was a mistake which he had a right to correct, and he altered the note in the presence of the sheriff, by adding the words "with interest from date." Lewis did not know of the alteration until after the note became due. When it became due, Schenck and Smith refused to pay it on account of the alteration. They both testify, that the agreement or understanding was not to pay interest, but only to pay the money at the end of eight months; and they refused to pay any part of the note, contending that the alteration of the note made it void, and that the complainant had no remedy against them.

The complainant relinquished his suit at law against them, and filed his bill in this court to compel the payment of the amount due on his execution, which the defendants had promised to pay.

The complainant gave a receipt to the sheriff, and authorized him to deliver the deed without further payment of his claim, upon the promise of the defendants, and their note given as evidence of it, to pay the claim in eight months. It was a bargain made by them with him, and not with the sheriff; it was a bargain made upon a good and valid consideration. The mere verbal promise was good; it was to pay a debt of their own, not that of another, and not within the statute of frauds. The note was given to secure the money they had so promised to pay. The consideration was, that the sheriff conveyed to Smith, for the use of Schenck, the interest which Lewis had in this farm by the lien of his judgment.

The alteration of the note by Vanderbeck was of a material part, and not authorized by the makers, either directly,

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and that therefore the grant of administration to the complainant by the surrogate of Essex, was unlawful and void. This evidence cannot be received, as the question of the right to administration cannot be examined here. The granting administration is exclusively with the Ordinary and his surrogates. The grant is a proceeding *in rem*, in the strict sense of that term. It constitutes the person to whom it is granted the administrator, whether rightfully or wrongly granted; and it cannot be inquired into here collaterally. The act of the surrogate can only be reviewed by appeal to the Orphans Court, or Prerogative Court. Like the acts of all other regularly constituted tribunals, the acts of the surrogate cannot be impeached collaterally. The only question that can be made is, whether he had jurisdiction. If the supposed intestate was not dead, or if letters lawfully granted to some one else were in existence, the grant would be void.

The other question is upon the admissibility of the evidence of the defendants. The action is by the complainant, in his representative capacity, and the defendants clearly cannot be witnesses.

By the answer and proofs, it appears that the premises were purchased by the defendant, Maria, of Martin B. Clinchard, on the first day of August, 1860, for \$5000, of which \$500 was paid in cash, out of her own separate property; the residue of the purchase money was to be paid in yearly instalments of \$500 each, without interest; the payment was secured by a mortgage on the premises. The defendants, or one of them, had kept a saloon and restaurant, for the sale of liquors and other refreshments, on the premises, from the year 1855; the premises were then rented of Clinchard. The answer states that the premises were leased to Mrs. Pergeaux, and the business was set up with her money, and conducted by her, with the advice and assistance of Mr. Pergeaux, who, for these services, was to have his support and that of his family, out of the profits; and the residue was to be for the benefit of the separate estate of Mrs. Pergeaux. Mr. Clinchard, in his testimony, states that the business was

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commenced on the premises in 1855, by Mr. Pergeaux and a Mr. Calame, in partnership, and that the money was furnished by Mr. Calame; that they had at first, a lease to them for two years, of the premises; that after that lease, he gave a lease to Mr. Pergeaux for the term of five years, before the expiration of which, the premises were conveyed to Mrs. Pergeaux. He says that Mrs. Pergeaux paid him the \$500 paid at the delivery of the deed; she paid it in French gold, just after her return from Europe; and that he understood it was money that she had received of her own estate, when in Europe. The answer on this point is responsive to the bill, and as it is corroborated by Clinchard, and contradicted by no one, it must be considered as established that the money paid at the conveyance to her, was the money of Mrs. Pergeaux. She had a right to buy this property with her own money, and to take the deed in her own name. And the deed or conveyance was no fraud upon his creditors, even if the object of taking the title in her name had been to avoid any claim by judgment against him, for debts which he then owed.

The subsequent payments of \$2500 or \$3000 were made out of the profits of the business carried on upon the premises; it was the business established there before the purchase of the premises, which had been continued since, conducted by Mr. Pergeaux and his wife. The answer says that these payments were made out of the separate property of Mrs. Pergeaux; but it claims the profits of this business as her separate estate, and does not set out any other separate estate which she had, out of which they could have been paid, and admits that she was enabled to make them by her success in business. In stating that the business in 1855 was set up by Mrs. Pergeaux, with her separate property, the answer is not responsive to the bill, and this fact is not proved by any witness; and the testimony of Mr. Clinchard contradicts it. As the proof stands, the business was set up by Mr. Pergeaux and Mr. Calame, with the funds of the latter, and was continued by Mr. Pergeaux, until 1860; with whose funds, or in whose name, does not appear; but the presumption is, if the

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business of a firm is continued in the same place after dissolution, by one of the members, that it is continued by him for his own benefit, and by his own means. The bill charges that the business *lately* carried on upon the premises, was carried on by Constant Pergeaux, in the name of Mrs. Pergeaux, and that they claim and pretend that both the premises and the business belong to Mrs. Pergeaux. The charge is indefinite, by the use of the word *lately*: but I shall consider it as going back to the purchase of the property, and that the answer is responsive to the bill, from that time. The answer states that the business was carried on by Mrs. Pergeaux, with her own money, in her own name, for her own benefit; and although Mr. Pergeaux assisted, that he was to receive for his services the support of himself and family, and nothing more.

A husband is, at law, entitled to the earnings of his wife. The common law is not altered in this respect by the married women's act. But he may allow his wife to take her own earnings and appropriate them to her separate use, and such appropriation is good, even as against his creditors. When they are invested in her name, neither he nor his creditors can disturb them. It has been so decided in this state, in the case of *Stall v. Fulton*, 1 *Vroom* 430, and in this court, in *Johnson v. Vail*, 1 *McCarter* 423, and in *Skillman v. Skillman*, 2 *Beas.* 403. These cases hold, that a husband may give to his wife the proceeds of her own labor, although, in such cases, the actual gift must be clearly proved. But the opinion of Chancellor Green, in *Skillman v. Skillman*, holds, that "where a married woman *carries on business* in her own name, the avails of the business are not protected by the statute in relation to married women, but they remain the property of the husband, liable to be seized and taken in execution for the payment of his debts." In New York, the act of 1860, not yet copied into the legislation of this state, provides for that; their act of 1848, from which our married women's act was copied, did not enable a mar-

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ried woman to carry on business for herself, in her own name. *Freeman v. Orser*, 5 Duer 477.

In the cases of *Skillman v. Skillman*, and *Johnson v. Vail*, Chancellor Green, in deciding that the wife is entitled to the rents and products of her farm or other property, and the products of the labor of herself and minor children, distinguishes these from the proceeds of trade, carried on by her with her separate property.

If a married woman cannot carry on trade or business in her own name so that she can bind herself personally in relation thereto, but such power is confined to contracts relating to such separate estate as she may legally hold, then it follows, as a necessary consequence, that the business is the business of her husband, and the profits are his property. And, while a husband may, as against his creditors, allow his wife to have for her separate use the earnings of herself and of the labor of their minor children, he may not give to her, to be invested in her own name, the proceeds of his own business, skill, and labor. Else it would follow, that any married man who became embarrassed, could transfer his business to his wife, and continue it himself in her name, with all his skill and ability, and if she only took, or seemed to take, some part in the transaction of it, might invest the proceeds of his labor and management in the name of his wife, and set his creditors at defiance.

The law was intended to protect the property and earnings of a married woman, and not the property or earnings of her husband against his creditors; and when, as in this case, they mix up the earnings of the wife with those of the husband, so that they cannot be separated, the husband cannot make a clear, distinct gift of her own earnings to his wife, and they remain, as at common law, his property.

There is no evidence in this case that the wife originally, or in 1860, put any of her separate property in this business, or that she had any separate property beyond the sum of \$500, paid to Clinchard. The only proof is in the answer, and beyond that sum it is not responsive, and there must be

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proof. And besides the fact that the government license, the only means by which the business could be carried on, was taken out in his name, there is much other evidence to lead to the belief that the business was really the business of the husband, transferred to, and carried on in the name of the wife, for the purpose of delaying creditors in recovering their debts. I do not doubt that such was the fact.

In either view of the case, the profits of the business, with which \$3000 has been paid on the mortgage to Clinchard, was the property of the husband, and, under the circumstances of this case, it must be considered as paid on that property, to keep it in her name beyond the reach of his creditors. This disposition of it, therefore, is a fraud upon his creditors, and so far as they are concerned, the property will be decreed to be held by the defendant, Maria Marguerite Pergeaux, in trust for the payment of his creditors, subject to the mortgage to Clinchard, and to her claim for the sum advanced out of her separate property for the purchase, and interest thereon.

CONOVER vs. VAN MATER and others.*

1. A mortgage taken with actual notice by the mortgagee, of an existing, unrecorded mortgage, will be postponed in favor of the prior mortgage, and that in the hands of an assignee without notice.

2. Bonds and mortgages have never been placed upon the footing of commercial paper; and an assignee takes them subject to all equities between the assignor and other parties, whether latent or not.

3. The payment of illegal brokerage to an agent for effecting a loan, where no part of it is received by the mortgagee, cannot taint the loan with usury.

4. The burthen of proof is on the party setting up the defence of usury. He must establish the facts necessary to constitute it, beyond reasonable doubt, and by a clear preponderance of testimony.

5. Usury is a defence not favored in equity; when the penalty was the forfeiture of the whole debt, it was considered unconscientious. It cannot be so regarded under the act of 1864; but the forfeiture of interest and

* CITED in *Morris v. Taylor*, 7 C. E. Gr. 440; *Atwater v. Underhill*, Id. 606; *Taylor v. Morris*, Id. 612; *Ins. Co. v. M'f'g Co.*, 10 C. E. Gr. 163; *Corning v. Ludlum*, 1 Stew. 400; *Kane v. Ins. Co.*, 10 Vr. 706.

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costs is yet a penalty, and the rule of evidence adopted both at law and in equity in case of penalties, must be applied.

6. An agreement for the payment of seven per cent. interest, (when such rate is allowed by law,) made in consideration of further forbearance after the mortgage became due, is valid. Subsequent mortgagees take their securities subject to these changes in the law as to those before them.

Mr. J. Parker and *Mr. R. Allen, jun.*, for complainant.

Mr. Vredenburg, for defendants.

THE CHANCELLOR.

The bill in this case, is for the foreclosure of five mortgages held by the complainant, given by the defendants, B. H. Van Mater and wife, upon his farm, in the county of Monmouth.

Maria Van Mater and Sidney Conover are made defendants, because they each hold a mortgage, given by B. H. Van Mater, upon the same premises.

The mortgages held by the complainant are: first, one given to Joseph T. Laird, to secure the payment of four thousand dollars, and interest, dated April seventh, 1862, and recorded April eleventh, 1862, and by Laird assigned to Daniel Bray, and by him to the complainant; second, one given to Daniel Bray, to secure thirteen hundred dollars, and interest, dated April first, 1865, and recorded April eighth, 1865, and assigned to the complainant; third, one given to the complainant, to secure the payment of fourteen hundred dollars, and interest, dated May thirty-first, 1865, and recorded June second, 1865; fourth, one to the complainant, to secure the payment of twenty-five hundred dollars, and interest, dated October nineteenth, 1865, and recorded November thirteenth, 1865; and fifth, one to the complainant, to secure the payment of twenty-two hundred dollars and interest, dated January twenty-second, 1866, and recorded the next day.

The defendant, Sidney Conover, who has not answered,

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holds a mortgage given to John H. Van Mater, to secure the payment of four thousand dollars, with interest, dated April seventh, 1862, and recorded May second, 1864. The defendant, Maria Van Mater, held a mortgage given to herself and her deceased sister, Eleanor Van Mater, and her deceased brother, John H. Van Mater. This mortgage was dated April seventh, 1862, and was recorded August twenty-eighth, 1865. It was given to secure Maria and Eleanor an annuity of two hundred dollars during the life of the longest liver, and the providing each with board, lodging, and medical attendance, during her life; and in one year after the death of the survivor, to secure to John H. Van Mater the payment of four thousand dollars. John died a few months after the date of the mortgage, and Eleanor in about a year after it. Maria was made defendant, as surviving mortgagee, and surviving obligee in the accompanying bond, and has died since the filing of her answer; and her representatives have been made parties to the suit in her stead.

The farm on which these mortgages were given, was conveyed to B. H. Van Mater, by Maria and Eleanor Van Mater, on the seventh of April, 1862, and the mortgage to them was to secure part of the consideration money.

The mortgage to Laird, by their consent in writing, was to be the first mortgage. These two mortgages, and the mortgage to John H. Van Mater of the same date, were executed at the same time, all the mortgagees being present; and it was agreed by all the parties, that the mortgage to Laird was to be first; that to Maria, Eleanor, and John, to be second; and that to John, to be third in priority of lien upon the premises. This is proved by the person who was the subscribing witness to all three, and before whom they were all acknowledged. In April, 1866, B. H. Van Mater surrendered the possession of the premises to Maria Van Mater, as mortgagee, who accepted it, and rented the premises to the defendant, Hendrickson, at the annual rent of five hundred dollars.

The defendants, B. H. Van Mater and Maria Van Mater,

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who have answered, contend that the mortgage to Maria and others, though not recorded before them, is prior to the mortgage to John, on account of that agreement; and to the mortgage to Bray, because he had notice of it; and prior to the fourteen hundred dollar mortgage to Conover, because he also had notice.

They also contend that the three mortgages to the complainant are each affected by usury, and that only the principal, less the usury or bonus paid, can be recovered; and set up this defence in their answer, specifying the amount paid as usury in each transaction, and the manner in which it was paid.

The complainant contends, that there is nothing due to Maria on the mortgage to her for arrears of annuity, support, or medical attendance; that the same should be adjudged satisfied; and that no account ought to be taken of these matters.

The first question to be considered, is the relative priority of the mortgages. The mortgage to Laird is admitted to be first. And the agreement stated by Walling, the subscribing witness to the mortgages to Maria and Eleanor and the mortgage to John, if made, as he states, at the time of the execution and delivery, gives priority to the mortgage to Maria, as between these two mortgages.

B. H. Van Mater testifies that Bray had actual notice of the mortgage to Maria before he took the mortgage given to him; this is not disproved, although Bray is living. The evidence cannot be disregarded, and the mortgage to Bray must, therefore, be postponed to the mortgage to Maria. It will have no effect upon this, that the complainant took the assignment of the mortgage to Bray, in ignorance of the existence of Maria's mortgage, and of the fact of the notice to Bray. It is the established rule, that the assignee of a bond or mortgage takes them subject to all equities between the assignor and other parties, whether these equities be latent or not. Bonds and mortgages have never been placed upon

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the footing of commercial paper, and purchasers deal in them at their own risk.

The mortgage for fourteen hundred dollars to the complainant, was given before that to Maria was recorded ; and there is no proof that the complainant had any notice of it. Notice to his brother, Sidney Conover, will not affect the complainant, unless it was proved that they were jointly concerned or interested in the mortgage. There is evidence that makes some joint concern, perhaps, probable. But no interest of Sidney is proved in such manner that a decree can be based upon it, except the fact that the money borrowed on that mortgage was to be paid to him, and was paid to him for debts B. H. Van Mater owed him. This is not such connection as would affect the complainant by notice to Sidney. Besides, Sidney denies notice to him.

The mortgage to Maria must be postponed to that to the complainant for fourteen hundred dollars. The relative order of all the others is according to the dates of recording.

The complainant's mortgage for fourteen hundred dollars being thus prior to the mortgage to Maria, which is prior to the mortgage to Bray and the mortgage to John, to both of which the fourteen hundred dollar mortgage is subject, if the surplus proceeds of the sale, after paying the mortgage to Laird, and the costs, are not sufficient to pay all three, enough of the proceeds to satisfy the amounts due on the mortgage to John, and on that to Bray, if there be so much, must be set aside, and the amount due to the complainant on his fourteen hundred dollar mortgage, must be next paid.

Out of the amount so set aside, the representatives of Maria must be first paid the amount due on the mortgage to her, less the amount so paid to the complainant on his fourteen hundred dollar mortgage ; and Sidney Conover must be next paid out of the sum so set aside, the amount due on the mortgage to John held by him ; and out of the residue of said sum, the balance due on the mortgage to Maria must be then paid. If the surplus proceeds are not more than

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sufficient to pay the amounts due on the mortgages to Bray and to John, the complainant will not be entitled to receive anything on his mortgage for fourteen hundred dollars.

The next question is as to the usury. There is no evidence whatever of any usury being paid to the complainant on the mortgage for fourteen hundred dollars. The evidence offered is, that Benjamin paid to Sidney three hundred and thirty-six dollars, as a premium on that loan; but there is no evidence that any part of this was paid to the complainant, directly or indirectly, or that he agreed to receive it, or any part of it. There is no evidence, even, that he knew of it, though if he had known that his brother, Sidney, had received this or any other amount of illegal brokerage for effecting this loan, it could in no wise have tainted this loan with usury.

The usury on the mortgage for twenty-five hundred dollars, is alleged to be the giving of a note for four hundred and twenty-five dollars, as a consideration for the loan. A note for that amount was given and was paid. The testimony differs as to the consideration of that note. The witnesses who differ, are the complainant and Benjamin H. Van Mater. They differ in such manner that it is difficult to believe that it can be either mistake or forgetfulness.

The transaction at the filing of the bill and answer, the time when their serious attention would be called to it, was so recent, and the amount so considerable, that it is difficult to conceive how either could mistake. The complainant shows that this note was for the balance of a note for five hundred dollars, loaned Benjamin on the nineteenth of September preceding, and he shows his check for that amount, of that date, endorsed by Benjamin. He says, for the mortgage he advanced one thousand dollars by a check, which he produces; that he paid fourteen hundred and sixteen dollars in cash, and credited seventy-five dollars on the five hundred dollar note, by giving it up for the four hundred and twenty-five dollar note; and the remainder, nine dollars, was the interest on the five hundred dollar loan. This account is

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circumstantial, but may be an invention; there is nothing to support it but the oath of the complainant; all the vouchers produced are consistent with Benjamin's story. The amount of the cash could be so stated as to suit either account, and the complainant fails to show where this cash came from, or why, when he gave a check for one thousand dollars, he did not give a check for the whole; and he is shown to be mistaken as to the source from which this cash came. But these difficulties attend equally the account of Benjamin. He says he received some cash; he thinks not quite one thousand dollars. The only question is, as to the last five hundred.

The evidence of Benjamin, as to this transaction, is not satisfactory. At first, he certainly failed to recollect the particulars of the transaction, and to a considerable extent varied his evidence; and he was mistaken in his account of the transaction at the giving of the mortgage of fourteen hundred dollars, to an extent that shows his recollection of such matters is not to be relied on. He is evidently not a careful, attentive, business man, and this may, perhaps, account for his not recollecting, with ordinary precision or correctness, business matters of this nature.

In this matter, the burthen of proof is on the defendant setting up usury. He is impeaching his own solemn obligations, under seal, and must establish the facts necessary to constitute it, beyond reasonable doubt; it is not sufficient to show an even balance of testimony; there must be a clear preponderance. Usury is a defence not favored in equity; the old consequence, the forfeiture of the whole debt, was so severe a penalty, that it was considered unconscientious.

The act of 1864 much modifies this; the penalty of forfeiture of interest and costs is very moderate for the willful disregard of a salutary provision of law, but yet it is a penalty. I cannot, under the present law, regard the defence as unconscientious, but must apply to the defence the rule of evidence that has always, both at law and equity,

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been adopted in case of penalties. The offence must be clearly proved ; in this case it is not.

The same reasoning will, with greater force, apply to the proof as to the mortgage for twenty-two hundred dollars. The evidence is still more doubtful there. I do not think that the evidence shows that nothing is due on the special conditions in the mortgage to Maria. The burthen of proof as to the payment of the annuity, is upon the defendant, Benjamin, and those claiming under him. I will take it as proven, for it was conceded to be so on the argument, that the annuity was paid for the first year. From April second, 1863, there is no proof of any payment exceeding one hundred dollars a year. The rest must be computed to the credit of Maria. The amount of the physician's bill, fifty-eight dollars and fifty cents, was not paid. The receipt of Dr. Cook shows clearly that Benjamin's note was not taken as payment ; and the board and lodging of Maria, from May first, 1866, must be taken into account. On the other hand, the mortgagees are entitled to take into account the clear rent of the farm, received by her since she took the possession.

The agreements for the payment of seven per cent. are valid at law ; they clearly bind Benjamin. They were made in consideration of further forbearance, after the mortgage was due. Until then, no charge could be made to affect subsequent encumbrances. But after they became due, the subsequent encumbrances are subject to such rate of interest as the law may authorize. A recent statute makes the legal rate of interest, where there is no agreement, seven per cent. The law, at the time of these agreements, allowed such rate as was agreed upon by the parties, not exceeding seven per cent. Subsequent mortgagees take their securities subject to these changes in the law as to those before them.

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THE CAMDEN AND AMBOY RAILROAD COMPANY vs.
STEWART.*

1. Specific performance of a contract for the conveyance of land will not be decreed, unless the property to be conveyed is fixed with certainty, or in such way that it can be ascertained with certainty. If anything is to be done in which the concurrence of both parties is necessary to ascertain the location or quantity of the land, the contract will not be enforced.

2. Part performance, to take the contract out of the statute of frauds, must be something done with the actual or constructive assent of the party sought to be bound. A purchaser cannot, by taking forcible possession of the lands claimed upon an alleged parol sale, without the consent, and against the remonstrance of the owner, evade the provisions of the statute, on the ground of part performance.

3. An injunction will not invariably be dissolved, even upon a full denial of the equity of the bill. It is always a matter in the discretion of the court.

4. Uncertainty in the description of the premises in the declaration of ejectment, in a suit brought in the Supreme Court, can only be remedied in that court.

5. The mere right to an easement over land which another party is entitled to retain in possession, will not be affected by the execution of a writ of possession for the premises, in an action of ejectment.

6. The Supreme Court is the appropriate tribunal for determining questions of law relative to the right of possession of lands, which may arise and be tried in an action of ejectment. And if they arise incidentally in a suit in this court, it would be proper to refer them to a court of law for its determination.

7. That a party, by pleading unadvisedly in a suit at law, may run the hazard of being beaten, and paying the costs, is not a sufficient ground for the interference of a court of equity.

This cause was argued on a motion to dissolve the injunction.

Mr. P. D. Vroom, in support of the motion.

Mr. J. P. Stockton, contra.

* CITED in *Henwood v. Jarvis*, 12 C. E. Gr. 258.

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The bill upon which the injunction was issued, is styled a cross-bill ; but so far as the subject matter of these injunctions is concerned, it is an original bill, and does not touch the matter in the original suit to which it refers as the suit to which it is a cross-bill.

The injunction is to restrain the defendant from proceeding in an ejectment suit, brought by him in the Supreme Court, to recover a lot called the paint shop lot, and also two strips of land, excepting the right of way of the complainant over the same, for one railroad track.

The bill alleges that the defendant did, in 1846, agree to sell to the complainant the lot called the paint shop lot, in the township of Bordentown, and the county of Burlington, for the sum of \$500 ; and that, in execution of that agreement, which was by parol, the complainant, with the knowledge and consent of the defendant, took possession of said lot in 1847, and erected buildings and improvements thereon, but that, as yet, the defendant has not given any deed for the lot ; and prays that he may be compelled to perform his agreement, and convey the lot. And the injunction was to restrain proceedings in the ejectment as to that lot.

The defendant, in his answer, denies that he made any such contract as in the bill stated, or any contract or agreement to sell any part of the lot, except as contained in a conversation set forth in the answer, had between him and the president of the company, in which he stated that he would sell to the company a lot for a paint shop, on the west side of the public road near which they stood at the conversation, for the price of \$400 per acre ; but that neither the location nor size of the lot was fixed or agreed upon, but were to be ascertained on a future survey to be made by the parties. But it was understood that the lot was not to extend to the river, or contain any river front.

The answer further states, that in the absence, and without the knowledge of the defendant, the complainant took posses-

sion of a lot extending to the river, which the defendant had not agreed to sell ; that he did not acquiesce, but remonstrated against it ; that he wrote a letter to the president, stating that the company was taking in much more ground than he had agreed to let it have ; that the company, or its agents, took no notice of his remonstrance, but proceeded to take and keep possession, without having the location or dimensions of the lot in any way further ascertained, and has held it ever since, without title from him, or waiting upon him, or having any communication in reference to the matter. The answer sets up the statute of frauds, as a defence to specific performance.

The injunction as to the paint shop lot, can only be sustained on the ground that the complainant has a right to the specific performance of the agreement to convey it. The answer, which is in this respect responsive, fully denies the agreement to convey, stated in the bill, and any agreement whatever to convey, except a verbal agreement that defendant would sell to the company a lot somewhere on the west side of the public road, at the rate of \$400 per acre ; the lot to be defined and located by a survey yet to be had.

It is an established rule in equity, that specific performance will not be decreed of any agreement, whether verbal or in writing, unless the property to be conveyed is fixed with certainty, or in such way that it can be ascertained with certainty. If anything is to be done in which the concurrence of both parties is necessary to ascertain the location or quantity of the land to be conveyed, it is not such a contract as will be enforced in this court.

If the defendant had signed an agreement in writing, that he would convey to the complainant a lot for a paint shop out of his lands on the west side of a designated public road, the location and quantity to be settled by the parties at a future day agreed upon, this court could not decree specific performance of such a contract. To entitle a party to that relief upon a verbal contract, on the ground of part performance, at least as much certainty is required.

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Nor is the part performance, as stated in the answer, such as to entitle the complainant to relief, if the objection stated did not exist to the contract. The part performance must be something done with the actual or constructive assent of the defendant. The mere standing still, and seeing the purchaser take possession of the land agreed to be sold, and erect improvements on it for the purpose for which it was purchased, without remonstrance, might be held as assent. This is fully denied by the answer. And it cannot be that a purchaser at an alleged parol sale, can, by committing a trespass and taking forcible possession of the lands claimed to be sold to him, against the consent of the owner, evade the wholesome provisions of the statute of frauds.

In either aspect, the answer denies the whole equity of the bill on which specific performance would be decreed, and the injunction must be dissolved as to the paint shop lot.

But, although the rule of the court is to dissolve an injunction founded upon the equity alleged in a bill, when that equity is fully denied by the answer, yet the rule is not imperative, but is subject to be modified according to the circumstances of each case, in the discretion of the court.

The immediate possession of the paint shop can be of no great consequence to the defendant; and if it is an important part of the apparatus by which the complainant, an important railway corporation, carries on its business, an eviction from it for a season may be a great detriment to that business. The complainant has been in possession for nearly twenty years, and it is possible, and, I think, probable, notwithstanding the full denial of the defendant, that during that time he may have, in some way that has escaped his recollection, assented to the sale of so much of the lot as is occupied by the paint shop and its appurtenant buildings, and to the occupation of it by the complainant, sufficient to entitle complainant to a specific performance as to that part. It seems to me, therefore, a proper case to exercise the discretion which the court has, so far as to restrain the complainant from being turned out of the possession of so much

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of the paint shop lot as is occupied by the paint shop and its accessory buildings, until the determination of this suit. The injunction must, therefore, be dissolved, except so far as to restrain the execution of any writ of possession for that part of the lot, until the further order of this court.

As to the two other strips of land mentioned in the second count of the declaration in ejectment, the complainant does not claim title to them, but only to the easement of a right of way over them; the defendant, in the declaration in ejectment, and in his answer, admits the right of the complainant to maintain one railroad track over them, but no more.

With regard to the objection raised in the bill, and upon the argument, to the uncertainty of the description of the premises in the declaration in ejectment, it can and must be remedied in the Supreme Court. That court has full power to order a bill of particulars with any degree of certainty that may be required.

As to the difficulty alleged on the argument, that may arise from the complainant admitting possession in the ejectment suit, it is a difficulty that must be met by parties or their counsel, in any ejectment suit. If the complainant has the right only to an easement over lands which the defendant is entitled to retain in his possession, then the recovery of the possession cannot injure the complainant. After a writ of possession executed, it will retain the right to any easement it now has, and will have any remedy against the obstruction, that now exists; and the right to the easement for a second or third track, cannot be affected by a recovery in ejectment.

Although the bill alleges that the complainant duly located its road over the lands of the defendant, it nowhere appears in the pleadings whether the two strips of land in the second count, or any part of them, are the lands on which the road was located. If they are, the question may well arise, whether the right to which the complainant by its charter is entitled in such lands, is a mere right to pass over these lands, the possession and control for other purposes remain-

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ing in the defendant ; or whether the purpose for which the charter gives them the right "to take possession of, hold, use, and occupy" lands, on which their road is located, does not require that the exclusive possession and control of the whole tract necessary for the road should be in the company, to enable them to protect the trains which run upon tracks occupying but a few feet of its width.

The absolute title and right of *reverter*, may remain in the owner, but the right to the exclusive possession for the objects of the incorporation be in the company, which right may properly be called an easement, as contradistinguished from the absolute title. This may be an unsettled question, and then perhaps there is doubt upon what the law may be ; but it is one peculiarly proper to be determined by the courts of law, where this suit is now pending.

It may also be an important question in this case, whether the eleventh section of the charter of the complainant, set forth in the bill, does not give it the right to the possession of the land included in the survey of the route filed in the office of the Secretary of State, upon such location being filed, subject to compensation afterwards to be made. Such question arose in an action of ejectment against the Morris Canal and Banking Company, reported in 4 *Zab.* 587, upon a clause in its charter similar to this section, and almost in the same words, and like this charter, passed before the Constitution required the compensation to be first made.

Such questions can be tried in an action of ejectment, and the Supreme Court is not only competent, but peculiarly the appropriate tribunal for determining them. And if they arose incidentally in a suit in this court, it would be proper to refer them to a court of law for its determination. That the complainant, by pleading unadvisedly in the ejectment suit, may run the hazard of being beaten in that suit and paying the costs, is not a sufficient ground for the interference of a court of equity, in which it must succeed or fail upon the same principle as at law, and in which the costs may be still greater.

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I see no question that can arise as to these two strips of land, which cannot be as well determined in the courts of law as here. And as to them, the injunction must be dissolved absolutely.

HOWE vs. HARRINGTON and VAN WINKLE.*

1. A deed for land, the legal title to which was not in the grantor at the time of the conveyance, is inoperative at law.

2. Covenants of warranty in a deed executed by an attorney, whose power only authorized him to sell and convey, and contained no authority to covenant, do not bind the grantor. Such deed, as against him, must be considered as a deed of bargain and sale, without covenants, and will not, by estoppel, convey after acquired property. It would, however, convey the equitable title of such grantor, if he had any.

3. If an agent, under a power of attorney, convey land under circumstances that make the conveyance a fraud on his principal, and the purchaser has notice of the facts, the title in his hands will be affected by the fraud, and equity will not aid him in removing defects in his legal title.

Mr. Boyd and *Mr. Gregg*, for complainant.

Mr. Fleming, for defendants.

THE CHANCELLOR.

This suit, brought by Samuel O. Howe, of New York, against Cornelius Van Winkle and G. H. Harrington and wife, is to compel the defendants to convey to the complainant a tract of land in Hudson city, in this state. This tract had been conveyed by Van Winkle to Harrington, on the nineteenth day of December, 1863, by a deed which the complainant alleges was fraudulent, and designed and executed to defraud him.

The complainant claims title through a deed dated September thirteenth, 1859, made by Cornelius Van Winkle, by William M. Gitt as his attorney, to Hamilton W. Shipman,

* CITED in *Lounsbery v. Locander*, 10 C. E. Gr. 559.

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by which this lot was conveyed to Shipman. That deed is inoperative at law, because Van Winkle, at that time, had not the legal title to the lot, but acquired it subsequently, in April, 1863, by a conveyance from John M. Cornelison and others, in whom the legal title was until then vested.

The deed to Shipman contained full covenants of warranty, but it was not signed by Van Winkle in person, and the power of attorney under which Gitt executed it, only authorized him to sell and convey, and contained no authority to covenant. The covenants, therefore, did not bind Van Winkle. *Nixon v. Hyserott*, 5 Johns. R. 58; *Gibson v. Colt*, 7 *Ibid.* 390. This deed must, as against Van Winkle, be considered as a deed of bargain and sale, without covenants; and such deed will not, by estoppel, convey after acquired property. *Sparrow v. Kingman*, 1 Comst. 242; 2 *Smith's Lead. Cas.* [624]; *Demarest v. Hopper*, 2 Zab. 620, opinion of Justice Carpenter.

If this position is not correct, then the title would, by estoppel, have vested in Van Winkle's grantee upon the conveyance to him; his title at law would be perfect, and this suit could not be maintained.

Yet such deed would convey the equitable title of the grantor, if he had any. But it does not appear from anything in this case, that Van Winkle had any equitable title to these lands. The lot had been devised to him by his grandfather, who, in his will, described it as a lot he got in exchange with Doctor Cornelison. No facts appear in the case to show that this testator, at his death, or Cornelius Van Winkle, at the date of the conveyance to Shipman, had such equitable title to this lot as would entitle him to compel the owners of the legal title to convey it. If, under a parol agreement for exchange, the owners of the legal title were willing to convey to Cornelius Van Winkle, he had an equitable claim under the will of his grandfather, to compel the other devisees under that will, as heirs-at-law of the testator, to convey the lot agreed to be taken in exchange, to John M. Cornelison, and the other owners of the legal title to the lot in question here.

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A bill was filed in this court by Cornelius Van Winkle against the heirs of his grandfather, on the allegation that the owners of the legal title to this lot were willing to convey. These owners were not made parties to that suit, and of course no decree was had against them. If they were not, in equity, bound to convey, but willing to do so, either from regard to their promise, or for the consideration that led to the agreement for exchange, then Van Winkle, at the date of the deed to Shipman, had no equitable title to convey, and the deed was a nullity.

The power of attorney under which the deed to Shipman was made, was given by Van Winkle to Gitt, on the twenty-fifth day of November, 1857, just after Van Winkle became of age, and authorized Gitt to receive, recover, and take possession of all his property, real and personal, and sell and dispose of the same, paying Van Winkle one half of the proceeds, and keeping the other half for his expenses and trouble; it was declared to be irrevocable. Such a power is, upon the face of it, inequitable and void of adequate consideration; and without any evidence of the character of the person to whom it was given, or the circumstances and representations under which it was obtained, must warn this court in attempting to give efficacy to anything done under it, and all purchasers taking title through it, to be on the look out for fraud.

By an agreement, dated on the eleventh of June, 1858, between Van Winkle and Gitt, in which it was recited that Gitt was equally interested with Van Winkle in all the property, real and mixed, to which he was entitled in New Jersey, Van Winkle, for \$100, advanced by Gitt toward the expenses, agreed with Gitt to perfect his title to the lot in question by proceedings in Chancery, or at law, and when recovered, to convey the same to Gitt; Gitt paying him one half the value of the same, less the \$100 advanced, and such other sums as Gitt might expend for such proceedings. The lot was worth at least \$1500. This agreement is, in substance, to give Gitt one half of the value for the *loan* of \$100; Van Winkle to be at the trouble and expense of recovering his

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property. This agreement is clearly so unconscientious on the face of it, and so devoid of all adequate consideration, that a court of equity would never enforce its performance. Besides, it is not claimed that Van Winkle or Harrington has ever been asked to perform it, or that one half the value of the lot, less the \$100, has ever been tendered to him. In fact, on the argument, counsel expressly disclaimed any claim to recover under this agreement, and placed his whole case upon the conveyance by virtue of the power.

The conveyance to Shipman was after the agreement of June eleventh, 1858, and after the same was recorded, and purports to convey as well the right of Gitt to the lot as the right of Van Winkle. The right of Gitt was under the agreement, of which Shipman from this deed must be presumed to have notice in fact; the record was notice in law. The deed was after the suit in Chancery was commenced, and before it was terminated. The attempt to sell this property under the power of attorney, after the agreement of June eleventh, while Van Winkle, under that agreement, was attempting to perfect the title, and before it was perfected, was a breach of faith and gross fraud by Gitt, and was equally a fraud on the part of any purchaser having notice of the existence of the agreement, as Shipman must have had.

The same presumption of notice affects all purchasers under him, including the complainant. And were the case free from the difficulty above stated, as to the effect of this deed upon the legal title, and the want of any equitable title for it to operate on, a court of equity would not lend its aid to any one claiming through such a transaction. This view renders it unnecessary to consider the conduct or title of Harrington, or to consider or determine upon the evidence of actual fraud, reaching down to the complainant in this cause.

The bill must be dismissed, with costs.

CASES

ADJUDGED IN

THE PREROGATIVE COURT

OF THE

STATE OF NEW JERSEY.

OCTOBER TERM, 1867.

ABRAHAM O. ZABRISKIE, ESQ., ORDINARY.

IN THE MATTER OF THE PROBATE OF THE WILL OF
GERTRUDE RICE McELWAIN, deceased.

1. Under the act of 1851 (*Nix. Dig.* 917), there are four requisites to a valid will. 1. That it be in writing. 2. That it be signed by the testator. 3. That such signature shall be *made by the testator*, or the *making thereof* acknowledged by him in the presence of two witnesses. 4. That it shall be declared to be his last will in the presence of these witnesses.

2. It is not sufficient that the signature be made by another, though at the request, and in the presence of the testator.

3. Where there is no proof as to the making of the signature, such acknowledgment is sufficient evidence that the testator made it, and would prove compliance with the requisite of signing by him. *Aliter*, when it is clear that he did not sign the will.

The testatrix was a married woman, and in the absence, and without the knowledge or assent of her husband, in August,

In the matter of Gertrude Rice McElwaine.

1865, made a will disposing of her real and personal property, and appointing her brother, E. P. Suydam, executor. She had been married but a short time, and had had no child.

Her husband, Thomas McElwaine, filed a caveat against the will.

She had dictated the will to Albertus Vandewater, who drew it; when drawn, he read it to her and asked her if that was her will; she answered, yes. He then asked her who she would have to witness it. She asked Vandewater and Cornelia Magee, two persons present who did witness it, if they would witness it. Vandewater then read it to her again, and asked her to sign her name. She took the paper and a pen in her hand, and said she could not, and asked Vandewater to sign her name for her. He did so in her presence, and brought the paper to her, and putting his finger on the name, asked her if that was her name and seal, and she said, yes. These two witnesses were present at the whole of the transaction, as stated, and signed their names as witnesses, in the presence of the testatrix. She did not, after her name was signed, touch the paper, or say that it was her signature, and there is no proof that, after her name was signed, she acknowledged or declared that it was her will.

The Orphans Court of Monmouth county, being of opinion that the will was valid to pass her real estate, in which her husband had no interest, but that it was void as to the personal estate, which went to the husband, admitted the will to probate, and granted letters of administration with the will annexed, to the husband, and refused letters testamentary to the executor.

The husband appealed from the part of the decree admitting the will to probate, and the executor from that part refusing letters testamentary, and granting administration.

Mr. J. Parker, for the executor.

Mr. W. H. Vredenburg, for Holmes McElwaine.

In the matter of Gertrude Rice McElwaine.

THE ORDINARY.

The statute of 1851, concerning wills, which must govern this case, directs that "all wills and testaments shall be in writing, and shall be signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will, in presence of two witnesses present at the same time, who shall subscribe their names thereto, as witnesses, in the presence of the testator."

Four things are required: First, that the will shall be in writing; secondly, that it shall be signed by the testator; thirdly, that such signature shall be *made by the testator*, or the *making thereof* acknowledged by him in the presence of two witnesses; fourthly, that it shall be declared to be his last will in the presence of these witnesses. Each and every one of these requisites must exist. They are not in the alternative. The third requisite contains an alternative, but one of these alternatives must exist. The second requisite, the signing by the testator, must exist. The second alternative of the third, to wit, that he acknowledge "making of the signature," will not supply the want of the second. Where there is no proof as to the making of the signature, such acknowledgment is sufficient evidence that he made it, and would prove compliance with the requisite of signing by him. But when it is clear that the testator did not sign the will, this acknowledgment is not sufficient. The words of the act are clear; and the object is equally clear, and requires this construction to the words.

The act of March seventeenth, 1713-14, which was in force until 1850, by its second section, (*Nix. Dig.* 919, § 37,*) required all wills to be in writing, signed and published by the testator in the presence of three subscribing witnesses. Under that, it was held in *Compton v. Mitton*, 7 *Halst. R.* 74, that acknowledgment of the signing in the presence of the witnesses was not sufficient; the actual signing must be in their presence.

* *Rev.*, p. 1250, *sec.* 35.

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The actual signing in this case, which was done by Vandewater, was done in her presence. The only question is, whether this is a signing by her.

In general, the maxim *qui facit per alium, facit per se* governs, and makes a signing by an agent a signing by the principal. But this act says the signature shall be *made* by the testator, or the making thereof acknowledged by him; it does not speak of acknowledging or adopting the signature, but of the making thereof. The fifth section of the statute of frauds, (29 Car. II, ch. 3,) which was in force in this state until the act of 1713-14, required that wills should be signed by the testator, "or by some other person in his presence, and by his express direction." The statute of this state, of 1713-14, and also that of 1851, in declaring the manner in which wills should be executed, have omitted these words, and must be held to have had an object in the omission. Again, the statute of 1 Vict. 26, ch. 9, from which our statute of 1851 is mainly taken, contains the same provision as the statute of frauds, "or by some other person, in his presence, and by his direction." The English statute of frauds, in which this language was first used, in other parts of it, carefully provides for the signing by an agent "lawfully authorized;" and in one section, by an agent "lawfully authorized by writing." That language has been adopted in this state, in all the re-enactments of those provisions of the statute of frauds; while in every statute relating to wills, the provision that wills may be signed by some one for the testator, was omitted. In the construction of the New York statutes, which in like manner omitted this provision, their courts held, that the omission in the principal section would have made the inference legitimate and unavoidable, that they intended to alter the law, and disallow such subscription or signature in the presence and by the direction of the testator, had not another section of the same act provided for the manner in which another person might sign the testator's name to the will, by his direction. *Robins v. Coryell*, 27 Barb. 559; *Chaffee v. Baptist Missionary Con.*, 10

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Paige 91 and 92. The words of the act of 1851, and also of the act of 1850, are stronger than those of the statutes 29 *Car. II*, or 1 *Vict.*, in England; they are, "the signature shall *be made* by the testator, or *the making* thereof acknowledged by the testator." While thus providing more carefully for the execution of a will, it must be supposed that they intended, by omitting the words in the English acts, to require, in all cases, some actual signature by the testator himself, and not to allow his name to be signed by any one, without the safeguards required of its being done by some person, *in his presence*, and by his *express direction*. Otherwise, a will written and signed for a testator, without his knowledge, or a substituted copy of one, already signed with a good imitation of his hand, might be shown him, and if he acknowledged the signature before two witnesses, and declared it to be his will, it would be executed according to the statute. The signing required by this statute must be held to be some *signature*, making some mark or *signum* upon the paper so as to identify and give efficacy to it by *some act*, and not by words merely.

This seems to be the meaning given to the word *sign*, in the English statute of frauds and other like statutes, in the cases where the question arose whether making a mark with the hand guided by another, was held a sufficient signing. *Wilson v. Beddard*, 12 *Sim.* 28; *Stevens v. Vancleve*, 4 *Wash. C. C. R.* 269; *Meehan v. Rourke*, 2 *Brad. Rep.* 393.

In *Stevens v. Vancleve*, Justice Washington holds, that the will which was executed by writing his name, his hand being guided by another at his express request, was executed in strict conformity with the English statute of frauds, which he assumed, perhaps wrongly, was in force in this state. There would have been no occasion to resort to this reasoning or assumption, if the signing required by the statute of this state, or the English statute of frauds, could as well be done by another for him, as by the testator himself. If signing by the testator included signing by another, the addition in the English statute is superfluous; and if intended only

In the matter of Gertrude Rice McElwaine.

to regulate the signing by another, it would have been added in another form.

Sir Herbert Jenner Fust, in *Gaze v. Gaze*, 3 *Curteis* 451, held that the Wills Act of *Vict.* 1 requires that it should *appear* that the signature was made by the testator himself, when it was not made by some person in his presence or by his direction; that the mere acknowledgment of the will is not sufficient. He did not require further evidence of the testator's handwriting, because the signature and the body of the will were evidently in the same handwriting. The will was an olograph will, and the body of the will was admitted by the answers to be in the handwriting of the testator; and he held this sufficient proof of the signature.

I have no doubt that this paper was intended by the testatrix as her will, and that but for the statute, it ought to have effect given to it so far as she had legal power to make a will. But if one safeguard provided by statute is dispensed with, another may be, and if I do so in this case, where the construction is clear, I may as well dispense with the requirement of writing, or of two witnesses. The danger is of frittering away the statute to avoid its effect when it works injustice.

I am of opinion that this will was not signed by the testatrix as required by law, and cannot, therefore, be admitted to probate. The decree of the Orphans Court must be reversed, and the testatrix declared to have died intestate, and that her husband is entitled to administer her personal property.

Trimmer's Executor v. Adams.

TRIMMER'S EXECUTOR, appellant, and ADAMS and wife,
respondents.

1. It is a settled rule, that on an appeal from a decree of the Orphans Court, no question can be raised in this court, not raised and decided in the court below.

2. A petition to the Orphans Court to set aside an account as illegally and improvidently allowed, and also to open the same for mistake and fraud therein, need not specify in what the fraud or mistake consists, or the items alleged to be affected thereby.

3. When an account is opened solely on the ground of fraud or mistake, proved to the satisfaction of the court, the settlement under the 27th section of the Orphans Court act, should be confined to correcting the items in which the fraud or mistake is proved, and such part or parts of the account as are affected by the change so made. The residue of the account not affected by such proof, should be allowed to stand as settled.

4. But when an account is set aside as improvidently allowed, contrary to the express provisions of the statute, it should be set aside altogether, and the parties allowed to contest every item of it.

5. When the decree of the Orphans Court setting aside the account, is affirmed, exceptions may be filed in the Prerogative Court, and the matter continued there until the final settlement of the account.

Mr. Van Fleet and *Mr. B. Van Syckel*, for appellant.

Mr. G. A. Allen, for respondents.

THE ORDINARY.

The appellant rendered his account as executor of the estate of Ann Trimmer, to the Orphans Court of the county of Hunterdon. It was filed in the surrogate's office on the seventeenth day of February, 1864. The oath of the accountant was taken before the surrogate on the twentieth day of March, 1864; and on the same day, he reported the account to the court for settlement and allowance, certifying that he had audited and stated the same, and that the same had been filed and advertised according to law. The court thereupon, on the same day, at what, in the caption of the

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decree of allowance, is styled March Special Term, decreed its allowance in all things as reported by the surrogate.

On the twenty-seventh of October, 1866, on a petition of George Adams, and Catharine, his wife, in which Catharine is alleged to be one of the children and heirs of the testatrix, and a legatee under her will, the Orphans Court ordered a citation to be issued to the appellant, to show cause on the twenty-third of November then next, why the decree of allowance should not be set aside as illegally and improvidently made, and why the account should not be opened for fraud and mistake therein. The citation was served, and the hearing of the matter was had on the fifteenth day of February, 1867, when the Orphans Court ordered the account to be opened for fraud and mistake therein, proved to the satisfaction of the court, and appearing on the face of the account. The decree recited that the account had been improvidently and inadvertently allowed, contrary to law, and that sufficient time had not elapsed between the reporting of the account and the allowance thereof.

By the account, it appeared that the executor had not sufficient assets to satisfy the debts and expenses. The estate accounted for was \$38.66, and the debts and expenses allowed were \$243.92.

Among the charges was one for \$66.60, costs in the Prerogative Court, and one of \$10, counsel fee, for arguing case in that court. There were also two counsel fees, one of \$15, and one of \$25, paid on the day on which the account was audited. There were only two charges, amounting to \$3.46, which could have been for debts of testatrix; all the others were for funeral expenses and expenses of administration. There was a charge for \$42, for commissions and forty-two days' service, by the accountant.

The respondents offered in evidence a certified copy of a decree in this court, on an appeal between these parties, in which the accountant was ordered to pay the costs in that appeal out of his own funds, and offered proof that the costs and counsel fee in the Prerogative Court, charged in the ac-

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count, were the fees in that appeal. The accountant objected to the copy, on the ground that it was illegal and incompetent. The court received the evidence.

The appellant appeals from the whole of the decree of the Orphans Court generally, without specifying the grounds of their appeal.

The first point taken by the counsel is, that it does not appear that the respondents were interested in the estate, or had any right to interfere in the matter. This objection was not raised in the court below, and that court made no decision upon it, and it is a settled rule on appeals of this nature, that no question can be raised here, unless it appears that the question was raised and decided in the court below.

In the next place, it appears in the petition filed in the Orphans Court, verified by oath, that the respondents were interested in the estate. This was sufficient proof to give them a standing in that court, until the question was directly raised by the written or oral responsive allegations of the accountant, denying the fact.

The next point of the counsel for the appellant is, that the petition in the Orphans Court did not specify in what the fraud or mistake consisted. The petition expressly asks that the account shall be opened, because it was improvidently allowed, at the same term at which it was presented. It does not specify the items in which the fraud was alleged. I do not think that there is any rule of law, or rule or decision of this court, that requires this specification in the petition; such a rule would, perhaps, be a salutary one for the Orphans Court to adopt.

Another point taken by the appellant is, that the court below received in evidence a copy of the bare decree in this court, without the preliminary proceedings. The general rule is, that a decree is no evidence, without the preliminary proceedings. I doubt whether that rule, or the reason of it, would apply to a case like this, when the charge of the accountant, for the costs of the appeal, admits the existence of it, and the decree was only opened to show that he was di-

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rected to pay these costs. But it does not appear that this or any other ground of objection was stated to the court. The question on which an appeal is based must have been submitted to the decision of the court below, and their opinion had upon it. Besides, there is no appeal from this decision of that court upon the evidence. And in this court, the whole record of the proceedings on that appeal is before the court.

The fourth point taken is, that the order is irregular and illegal, because it opens the whole account, and does not merely re-state and correct it in the items in which the fraud or mistake is proved. If fraud or mistake in the account, was the only ground of the action of the court below, this objection would be well taken. The re-settlement of an account for fraud or mistake, proved to the satisfaction of the Orphans Court, under the twenty-seventh section of the Orphans Court act,* should be confined to correcting the items in which the fraud or mistake is proved, and such parts of the account as are affected by the change so made. The residue of the account, not affected by such proof, should be allowed to stand as settled. But in this case, it appeared that the account had been improvidently allowed, contrary to the express provision of the statute; it was allowed by the court at the same sitting when the report was made. The whole allowance of the account was wrong, and if set aside for that cause, it should be set aside altogether, and the parties interested should be allowed to contest every item in it.

The decree setting aside the account, distinctly recites that it appeared to the court that it was allowed without sufficient and legal time between the reporting and allowance; and although, after this, it orders it to be set aside for fraud and mistake therein, and the allowance thereof, yet these words may be treated as surplusage, or as referring to the mistake in the allowance before the proper time. And if the decree of allowance was rightly set aside, under the general authority of courts to correct errors and mistakes in their own

* *Rev.*, p. 775, *sec.* 108.

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decrees, the court below was right in allowing exceptions to be taken to any part of the account.

The conduct of the accountant, in charging in his account the expenses of an appeal which this court had decreed should be paid out of his own pocket, was a gross fraud, and the account should have been re-stated for that, if the allowance had been regular in time and form. He exhibited to the surrogate and the court below, an account, with this charge in it, and made oath that it was just and true, without exhibiting the decree of this court, which would have shown that it was unjust and false.

Let the decree of the Orphans Court be affirmed with costs ; and as the account and proceedings are now in this court, let the respondents have leave to file their exceptions in this court, where the matter may be continued until the final settlement of the account.



CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE
STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY.
JUNE TERM, 1866.

THE KEYPORT AND MIDDLETOWN POINT STEAMBOAT COMPANY, appellants, and THE FARMERS TRANSPORTATION COMPANY, and others, respondents.*

1. A right given by the legislature to the owner of the shore on navigable water, to build a wharf in front of his land, does not, by implication, carry with it a right to have, as against the adjoining proprietors, the water-space kept open so that vessels can be moved along the sides of such wharf.

2. Nor does the fact that it is highly convenient for vessels in turning to use an open space at the side of such wharf, preclude the owner of the contiguous water-front from extending such front, by force of a legislative license, so as to interfere with such use.

3. The decisions heretofore made in this state appear to be based on the concession, that unless the land under the flow of tide water has been actually reclaimed, it belongs, as property, to the public, and as such is subject to the uncontrollable proprietorship of the state; and this doctrine appears to be sustained by the current of decisions in the United States.

* CITED in *Stevens v. Pat. & New. R. Co.*, 5 C. E. Gr. 135; 5 Vr. 556; *Hoboken L. & I. Co. v. Hoboken*, 7 Vr. 551.

Keyport Steamboat Co. v. Farmers Transportation Co.

This was an appeal from a decision of the Chancellor, reported *ante* p. 13.

Mr. H. S. Little and *Mr. Browning*, for appellants.

Mr. J. Parker and *Mr. C. Parker*, for respondents.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

The appellants, who were the complainants in the court below, are the owners of a wharf on the south side of Raritan bay, and along the channel of the Matawan creek, where the same empties into the bay. This wharf, which has been commonly known as the Keyport dock, has existed in its present condition, with the exception of a slight enlargement on the west side, for over fifteen years. The complainants have title to a part of the shore line, in front of which this wharf is extended. This structure was originally erected by certain associates, by force of their supposed riparian rights, but on the nineteenth of February, 1851, (*Pam. Laws* 25), an act of the legislature was obtained, which declared that said associates and their successors, in the words of the act, "are hereby constituted a body corporate, by the name of the Keyport Dock Company, for the purpose of keeping, continuing, and maintaining the dock or wharf now owned by the said company, situate in the village of Keyport, township of Raritan, Monmouth county, and extending from said village into Raritan bay, and from time to time to repair or rebuild the same, and to extend or enlarge the same, when necessary for the better accommodation of boats or vessels; provided that such extension or enlargement shall not interfere with the navigation of said bay, river, or creek." This act was subsequently repealed by the act of the twenty-fourth of March, 1864, (*Pam. Laws* 467,) which also invested the complainants with this property, and with the privileges and franchises of the Keyport Dock Company.

The defendants, who are also owners of property on the

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south side of Raritan bay, to the east, and contiguous to the line of the complainants, have commenced the erection of a wharf in front of this land, which, as the same has been planned, will extend to the navigable water, but will not project in front as far as the wharf of the complainants, by about thirty feet. If built as contemplated, it will come within seventy-three feet of the complainants' wharf in the front, and within about forty-five feet of it at an intermediate point nearer the shore. The defendants claim that the improvement thus commenced is authorized by an act of the legislature, passed in the year 1866, whereby the following privilege was conferred on one George J. Kibbee, his heirs and assigns, viz. "to build, maintain, and keep in repair, a dock or wharf, or to lease, for a term of years, to any person or persons, or to any incorporated company, for the purpose of building, maintaining, and keeping in repair, a dock or wharf upon and in front of his lands, in said township of Raritan, extending a sufficient distance into said Raritan bay for the accommodation of vessels navigating the same; provided the said dock or wharf shall not obstruct the navigation of the said bay; and provided that this act shall not affect the legal rights of any person whatever." It is not denied that all the franchises and rights of Mr. Kibbee proceeding from this act, have passed, by force of a formal deed of assignment executed by him, to the defendants.

The bill which was filed in the Court of Chancery, was intended to prevent, by means of an injunction, the defendants from progressing with the erection of their wharf, which they had begun by virtue of the authority, and under the circumstances, above mentioned. It will be observed that the defendants are possessed of the title to the land along the shore in front of which they have commenced to make the improvement in contemplation, and that they are also acting under color of legislative authority; this being their admitted status, the burthen then is thrown upon the complainants, to show that they are about to transcend the privileges thus derived to them, and that such abuse injuriously affects, in

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a material degree, their own rights. The legislative grant to the defendants, and the limitations of such grant, are clear and definite; the privilege given is to erect and maintain a wharf in front of their land, the restrictions of that privilege being that such erection shall not obstruct navigation, and shall not injuriously affect the legal right of any other person.

It cannot be reasonably pretended that the construction of the defendants' wharf, in the manner now designed, will be an impediment to general navigation, within the meaning of the prohibitory clause of their charter. The wharf is not to be pushed into the bay beyond the line where it will first reach the navigable water, and it was to accomplish that end that their special privileges were conferred upon them. It is entirely clear, therefore, that there exists no reason whatever to impute to the defendants any attempt, in this particular, to abuse the authority which they have derived from the state, and under which they assume to act. This consideration narrows the inquiry, and limits it to the single point, whether the defendants, in doing the act in question, will invade the legal rights of the complainants. We are thus led to examine what those rights are which the complainants claim, and which, they allege, will be thus essentially injured.

In their bill, the complainants have specified two grounds of complaint: First, that in consequence of the propinquity of the contemplated structure of the defendants, they will be hindered from receiving vessels along the east side of their wharf; and, in the second place, that they will be deprived, from the same cause, of the privilege heretofore enjoyed by them of turning their own boats partly in this same space. The case made in the pleadings and in the affidavits, shows that the steamboats now used by the complainants are two hundred and twelve feet in length, and fifty-three feet beam; that the channel in front of their wharf, at low tide, is not of sufficient width to admit of their turning their boats; and that their practice has heretofore been, in returning from New York, to run the bows of their boats a considerable distance along the east side of their wharf, where, by throw-

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ing out a line, they can back and round the boats to the front of their wharf in position to discharge their passengers and freight, and in readiness to start on their next trip. It is clearly manifest, from the proofs, that these boats, on their return trips, can run directly to the face of the wharf without any noticeable hindrance; but it is insisted, that if they do this they must wait, with their steam kept up at an expense, for a change of tide, before they can turn their head in the direction of their next trip. The point for solution is, are these privileges, which it is clear have, to some extent at least, been enjoyed, to be considered as legal rights vested in the complainants.

My consideration of the case has led me to the conclusion that the complainants have presented no substantial grounds on which to support the claims thus made. A capacity to receive at their sides, vessels, to load and unload, cannot properly be said to appertain as of right to these statutory wharves. Such an incident will not arise by implication; and the grant of the franchise to construct and maintain a wharf, does not embrace it. In fact, these erections are designed to go merely to the line of navigable water; if they extend beyond this, they, of necessity, become to some extent, obstacles to navigation, a result which is, in general, specially prohibited; so that in the nature of the thing itself, it is the front of the wharf, and not its sides, which affords the proper berth for vessels. It is of great practical moment that this feature should be kept in view, because, if the grant from the state of a privilege to erect a wharf carries with it, as a convenient appurtenance, the right to receive vessels at each of its sides, it follows, necessarily, that in all cases such space must be left open, and thus the extension of one water front becomes the exclusion of the exercise of a similar right by the adjacent shore owners. Indeed, if the construction of the charter of the complainants as contended for, be correct, the result must be that when one proprietor of riparian land has acquired, under the provisions of the general act of the state, the right to run out a wharf in front of his premises, he has

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also acquired, as a legal concomitant of such right, the power to prevent his neighbor on each side of him from enjoying a similar privilege. I think, upon reflection, it will be conceded that such cannot be the legitimate import of these legislative grants. The fair, and as I think, the very obvious interpretation of them is, that the owner of land along the water line thereby gains the right to extend his front to the point of navigation. The general statute, just alluded to, which authorizes in an appointed mode, the building of wharves, is framed, in all its parts, on this idea; for its principle is, very clearly, to give an equal privilege to each riparian owner. Nor is it necessary, at this time, to consider the important question, whether a shore owner can, by force of legislative authority, for the benefit of a private person, be deprived of any of the natural advantages incident to the situation of his land upon tide water. It has already been conclusively settled by judicial decisions in this state, that after such land owner has reclaimed from the dominion of the water the land along his front, even beyond low water mark, his title to such portion thus reclaimed becomes vested and indefeasible, except so far as it, in common with all other property, is subject to the state's eminent domain. These decisions are based, perhaps, on the concession, that unless the land under the flow of tide water has been actually reclaimed, it belongs, as property, to the public, and as such is subject to the uncontrollable proprietorship of the state; and such, it would seem, is the doctrine sustained by the current of decisions in the United States. But not being requisite for the purposes of this case, it is not intended to intimate any opinion on this subject. It is at present, sufficient to observe that the public sentiment, from the earliest times to this day, and the whole course of legislative action in this state, have recognized a natural equity, so to speak, in the riparian owner to preserve and improve the connection of his property with the navigable water, and that the consequence is that a strong presumption arises against all implication of an intention on the part of the legislature to

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violate such equity. In my opinion such a design should not be deduced from the words of any statute, either general or special, except when it contains language not susceptible of any other rational interpretation. In the present instance, the charter upon which the complainants rely, is devoid of all expressions having a tendency to indicate a purpose which, in itself, is so improbable. The ability which is conferred by this charter to extend or enlarge a wharf, can be given a reasonable scope without imputing to the language used a meaning which would authorize the doing of an act which would be regarded, in public opinion, as an infringement of a right. The substantial effect of this charter, in my opinion, is to legalize the wharf as it existed at the time of the passage of the act, with a power to enlarge it in width to the extent of the shore front then owned, or which might thereafter be acquired, by the company. This part of the claim of the complainants must therefore be rejected.

As to the other insistment, of a right to an open space on the east side of their wharf, for the purpose of facilitating the turning of their boats, it seems to me that it has not, in principle, the slightest foundation on which to rest. It is true, that a grant of a right to build and maintain a wharf bears with it, by implication, the right to use it; but then such use must be in the ordinary mode. Extraordinary, unusual modes of use, no matter how convenient they may be, are not annexed as incidents in law to such grant. And it certainly cannot be denied that this mode of use of this wharf, the right to which is now asserted, is not an ordinary one. That it is a necessary one, there is no pretence. Nor is it any answer to this objection to say, that such use has become almost indispensable to the enjoyment of this wharf in its connection with the business to which it has been put. The state, in making this grant to the complainants, did not guarantee to them that they could use their structure at all stages of the water, or with boats of certain dimensions. Nor was it any part of the agreement, that if the complainants could not, at certain tides, use their wharf to advantage

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in the common way, that the state would permit them, in abridgment of her rights, to resort to uncommon methods of enjoyment. There is no evidence in the case, so far as I am aware, to show that a right to turn a vessel in the manner above described, is a right appurtenant to wharves in general; it cannot, therefore, on any known principle, be claimed to be annexed, by operation of law and without express grant, to this particular wharf in question.

Reaching this result, it becomes unnecessary to consider the other questions which were so ably discussed by counsel on the argument.

Concurring entirely in the conclusions of the Chancellor, I am of opinion that the injunction was rightly refused, and that the decree should be affirmed, with costs.

Decree affirmed by the following vote:

For affirmance—BEASLEY, C. J., BEDLE, CLEMENT, CORNELISON, DALRIMPLE, ELMER, FORT, HAINES, KENNEDY, VAIL, VREDENBURGH, WALES, WOODHULL. 13.

For reversal—NONE.

NOVEMBER TERM, 1866.

THE TIDE-WATER COMPANY, and others, appellants, and
COSTER, respondent.*

1. For the purpose of reclaiming large tracts of lands, the rights of eminent domain and of taxation may be employed.

2. Whether a scheme of improvement be of such public utility as to justify a resort, for its furtherance, to the power of taxation and eminent domain, is a matter to be decided by the legislature.

3. By the charter of "The Tide-water Company," commissioners were to be appointed who were authorized to make a contract with such company, for the draining of large tracts of meadow land, the property of various

*CITED in 9 C. E. Gr. 469; 5 Vr. 229; Id. 242; 6 Vr. 211; Id. 501; 7 Vr. 57; Id. 293; Id. 447; 8 Vr. 422; 10 Vr. 434; Id. 581.

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individuals, said commissioners being also empowered to assess upon said lands, when reclaimed, a just proportion of the contract price—*held*, that such scheme was illegal and void, inasmuch as the expense to be levied on the land was not limited in amount to the extent of the benefit to be conferred.

4. The cost of a public improvement may be imposed on the property peculiarly benefited; but the cost beyond this measure must be levied from the public at large.

5. To compel the owner of property to bear the expense of an improvement except to the extent of his particular advantage, is, *pro tanto*, to take private property for public use without compensation.

The opinion of the Chancellor is reported *ante p.* 55.

Mr. Williamson and *Mr. P. D. Vroom*, for appellants.

Mr. Vanatta and *Mr. McCarter*, for respondent.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

The appellant, the Tide-water Company, is a corporation created by an act of the legislature, passed April fourth, 1866. The purpose for which this company was called into existence, was to assist in draining the tide-water marshes adjoining Newark bay and its tributary streams. The means by which this useful end was to be attained were, in the statutory language: "The construction, maintenance, and management, of suitable dykes, drains, ditches, dams, sluices, engines, pumps, and all other machinery, works, and structures, necessary or useful in the improvements required to fit said lands for occupancy and use, and for the maintenance of the drainage thereof." And with the view of providing these means, the corporation in question was formed, with a capital stock of \$1,000,000. In addition to the organization of this incorporated body, the act authorizes the appointment, by a justice of the Supreme Court, of three commissioners, who are empowered to enter into a contract with the Tide-water Company for the performance of the work above specified; it being re-

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quired, however, that before such contract should go into effect, it should be confirmed by a judge of the Supreme or Circuit Court. The direction for the raising and payment of this contract price is contained in the following clause: "That said commissioners, after making the contract provided for in the next preceding section of this act, and after the reclaiming of said lands, or any part thereof, shall have been completed according to said contract, shall assess upon the said lands so reclaimed a just proportion of the contract price, and of the expenses of said commission, and shall cause the same to be collected annually, and shall pay the stipulated compensation to said company." These assessments are also made liens upon the lands, respectively, and a sale is authorized in case of non-payment.

These are the general aspects of this statute, and for the purposes of this opinion it is not necessary to dwell on details.

Commissioners having been appointed, the Tide-water Company presented the outline of a contract to them for their consideration; and at this stage of the proceedings, further action was arrested by an injunction issued out of the Court of Chancery, founded on a bill filed by the respondents in this court, who are the owners of certain of the meadows to be affected by the act. A motion to discharge the injunction for want of merits in this bill having failed before the Chancellor, has given occasion for this appeal.

The injunction in the court below was issued and sustained upon the ground that the act of the legislature, to which reference has just been made, was unconstitutional. It is not now pretended that the judicial suspension of these proceedings is to be justified from any other consideration. The only question therefore to be resolved at the present time by this court is, as to the power of the legislature to enact the law which forms the basis of this controversy.

That the legislative authority is competent to effect the end provided for in this act, I can entertain no doubt. The purpose contemplated, is to reclaim and bring into use a tract

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of land covering about one-fourth of the county of Hudson, and several thousand acres in the county of Union. This large district is now comparatively useless. In its present condition, it impairs very materially the benefits which naturally belong to the adjacency of the territory of the state to its navigable waters. It is difficult, from the great expense of such works, to build roads across it, and consequently it has heretofore interposed a barrier to anything like easy access, except by means of railroads, from one town to another situated upon its borders. To remove these evils and to make this vast region fit for habitation and use, seems to me plainly within the legitimate province of legislation; and to effect such ends, I see no reason to doubt that both the prerogatives of taxation and of eminent domain may be resorted to. From the earliest times, the history of the legislation of this state exhibits many examples of the exercise of both these powers for purposes not dissimilar, and by these means, without question, many improvements have been effected. The principle is similar to that which validates the transfer by legislative authority, of private property to private corporations for the construction of railroads and canals, or the construction of sewers and streets, and the imposition of the expense on the lands benefited. It is the resulting general utility which gives such enterprises a kind of public aspect, and invests them with privileges which do not belong to mere private interests. I have no difficulty, therefore, in concluding that the legislature was fully authorized to adopt measures to accomplish the general design embraced in this act, now under the consideration of this court.

Nor, in this connection, should it fail to be observed, that it is one of the legislative prerogatives to decide the important question, whether an enterprise or scheme of improvement be of such public utility as to justify a resort, for its furtherance, to the exercise of the power of taxation or eminent domain. Primarily, the judiciary has no concern in such matter. And not only this, but if the public interest be involved, to any substantial extent, and if the project con-

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templated can, in any fair sense, be said to be promotive of the welfare or convenience of the community, the legislative adoption of such project is a determination of the question, from which there is no appeal, and over which no other branch of the government has any supervision whatever. Whether a road, a turnpike, a bridge, or a canal, will subserve public or private needs, are inquiries addressed exclusively to the law-making power, whose answer, according to the genius of our government, must be final and irreversible. This doctrine has been often propounded as the undoubted rule of law, by the most eminent elementary writers, and has received the sanction of much judicial adoption. "It undoubtedly must rest," says Chancellor Kent, "as a general rule, in the wisdom of the legislature, to determine when public uses require the assumption of private property." 2 *Kent's Com.* 340. In *Cottrill v. Myrick*, 3 *Fairfield* 222, it is remarked: "It rests with the legislature to judge of the cases which require the operation of the right of eminent domain, and it may be applied in cases of roads, turnpikes, railways, canals, ferries, bridges, &c., provided there be, in the assumption of the property, evident utility and reasonable accommodation as respects the public." And in *Beekman v. Saratoga and Schenectady Railroad Company*, 3 *Paige* 73, equally explicit upon this subject, is the language of Chancellor Walworth: "But if the public interest," such are the words of this enlightened jurist, "can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose. It is upon this principle that the legislatures of several of the states have authorized the condemnation of the lands of individuals for mill sites, where, from the nature of the country, such mill sites could not be obtained for the accommodation of the inhabitants, without overflowing the lands thus condemned. Upon the same principle of

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public benefit, not only the agents of the government, but also individuals and corporate bodies, have been authorized to take private property for the purpose of making public highways, turnpike roads, and canals; of erecting and constructing wharves and basins; of establishing ferries; of draining swamps and marshes; and of bringing water to cities and villages."

These citations embody, in my opinion, the correct and established principle, and, at the same time, illustrate the nature and define the extent of such principle. The legislative power is not competent to take the property of A and transfer it to B, simply for the benefit or convenience of B, because such an act has no public aspect; it concerns and affects, exclusively, the two individuals. In such case, it would be within the authority of the judiciary to pronounce such transfer unconstitutional and void. But if the sequestration of the property of A will, to a material extent, be serviceable to the public at large, whether such sequestration shall take place, must be committed, as a pure matter of discretion, to the legislature, provided such discretion be exercised in good faith, and does not rest, incontrovertibly, upon a false foundation. Applying this rule to the facts of the present case, it seems to me that no person can deny that the decision which the legislature has made, to the effect, that the project provided for in the act at present considered, is an authorized act of legislative authority, has in it elements of public utility, and that, consequently, this court has not the power to review such decision. A statute, authorizing the erection of a dyke at the public charge, for the purpose of protecting large sections of land within the state from the overflow of freshets or the reflux of the tide, would be universally acknowledged to be clearly within the bounds of legitimate legislation, and yet it is conceived the purpose of the present law is not, in its general character, dissimilar from such a public work. The object proposed, and for which provision is made in the statute under review, being, then, one tending to the benefit of the community at large, must be regarded, upon principles

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which are too valuable to social interests to be disturbed, as coming exclusively under legislative control. The objection raised on this foundation in the argument, consequently, is not solid.

Nor have I been able to perceive much force in many of the topics of objection embraced in the arguments of counsel. One of the principal reasons urged why this act could not be enforced, was that it authorized the commissioners to pay to the company more than the expense of constructing the works and performing the labor, incident to the enterprise. It was insisted, that beyond such actual cost and expense, these officers, by force of this statute, could agree to pay to the corporation such sum as they saw fit; and that, as to such excess, the property of the land owner was taken from him without compensation. If this, in point of fact, be so, the conclusion of the counsel of the respondents would be indisputably logical; the act would be plainly unconstitutional. But upon looking at the provisions in question, no trace of such an authority can be perceived. The act empowers the commissioners to contract with the company for the construction and maintenance of the works; and provides that they "shall pay said company such annual compensation therefor, as such contract shall specify." But can it be reasonably pretended, that by virtue of such an authority the commissioners have the right to agree to give more than a fair compensation for the labor to be performed and the capital employed? If an agent be empowered, in general terms, to make a contract for his principal, can he rightfully bind his principal to exorbitant terms? If he do so knowingly it would be a fraud; and, in the same way, these commissioners could not honestly stipulate to pay more than a fair price for that which they contract. It will be kept in mind that, with our present aim, the only question is, what is the extent of the authority in this respect conferred by the statute on these officials? What they may intend, or what the corporation may expect them to do, cannot, in the remotest degree, touch the point of the legislative power which is now before us. It may be true, as

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was so forcibly urged on the argument, that it is the expectation of this corporation to effect an agreement with these commissioners, by force of which they would be entitled to an interest the extent of which will be contingent on the ultimate success of the enterprise and the consequent value of the lands reclaimed. I have no hesitation in saying, that in my opinion, any arrangement by which the compensation of the appellants, for the work to be contracted for, should be made to turn, in any degree whatever, on the future value of the lands, and which by any possibility could be in evident excess of the real cost of the works, would be illegal and void. Such an arrangement could not receive, as I think, judicial sanction under any circumstances, unless with the assent of all the owners of the land. The legislature would not be competent to authorize a contract of that description. This corporation must be regarded as a contractor to do the work incident to the enterprise in question ; and all that the commissioners could agree to pay would be the expenses, and a reasonable profit. They could not bind the land owners to pay more than this, no matter how valuable their property, by reason of this scheme to improve it, might turn out to be. If a speculative remuneration for the use of their money and labor is contemplated by the projectors of this scheme, they must utterly fail to carry it through by legislative assistance. For I think it beyond question, that such a plan cannot be forced upon any owner of property against his will. A compact between the land proprietors and capitalists, whereby the latter should undertake the expense and risk of the improvement of the land for a stipulated return, to be graduated, not so much by the actual expenditure as the anticipated increase in value of the lands, might be very reasonable in itself, and mutually beneficial ; but it is a compact to which the assent of the land owner is indispensable ; and if, under this law, the commissioners should take upon themselves to enter into an agreement of this character with the Tide-water Company, I cannot but think it would be pronounced to be void as soon as it should be brought to the cognizance of the courts.

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But in the act in question, nothing is perceived which appears to lend countenance to the formation of such a contract, and as has been before remarked, it is of no consequence to the present inquiry, what the expectations of these corporators may be. This statute, in my opinion, does not warrant any contract, by force of which the corporation shall be entitled to receive anything more than a fair equivalent for the work and money expended; and, consequently, I am unable to hold it void on the ground above suggested, that it permits the commissioners to agree for a payment unlimited in extent, and in excess of such equivalent.

Nor do I perceive any constitutional objection in the mode prescribed by which the company is authorized to condemn lands necessary for the successful prosecution of the undertaking. Such mode is not unlike that which is usually found in the charters of railroad companies, and appears to be unobjectionable in all respects. Much was said on the argument with regard to the great damage which many of the land owners would suffer in consequence of the works and embankments of the company cutting off the water fronts of their lands, and the consequent loss of riparian rights; but if such rights exist, for these and all other damages of a similar kind the act provides full compensation. As to the circumstances that the corporators are strangers, and uninterested in these lands; that no oath is required of the commissioners; that it will be difficult for these officers to estimate the cost of the original works, and the expense of maintaining them; and a multitude of similar incidents, I pass by without comment; for they obviously relate to the policy and not to the validity of the law, and whatever weight they may have been entitled to in legislative deliberations, they can exert no influence whatever over the decision of this court.

But looking more closely into the structure and effect of this statute, there appears to be a defect which seems to be both radical and incurable, and which must prevent its judicial enforcement. The defect alluded to is this: no provision is made for the indemnification of the owner of the land

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subjected to the operation of this law, in case the expense of the improvement shall exceed the benefits which shall be conferred. The act authorizes the entire expense of drainage to be imposed upon the lands, whether such expense falls below, or rises above, the increase in value which may accrue to the lands by reason of such drainage. In other words, the cost of the enterprise is to be imposed as a burthen on the lands, even though a full equivalent in the way of improvement, shall not be given to the land owner. Thus, if the cost of drainage should be \$5 an acre, such sum is to be assessed on the land, although such land may not be benefited more than to the extent of \$3 an acre. The statute does not require that the apportionment of expense shall be limited, as the maximum rate, by the increase in the value to result from the improved condition of the land. Now, therefore, it seems to me obvious, that if this scheme be carried into effect, in the event of an excess of expenses over benefits, private property, *pro tanto*, will be taken for public use without compensation. Where lands are improved by legislative action, on the ground of public utility, the cost of such improvement, it has been frequently held, may, to a certain degree, be imposed on the parties who, in consequence of owning lands in the vicinity of such improvement, receive a peculiar advantage. By the operation of such a system, it is not considered that the property of the individual, or any part of it, is taken from him for the public use, because he is compensated in the enhanced value of such property. But it is clear this principle is only applicable when the benefit is commensurate to the burthen; when that which is received by the land owner is equal or superior in value to the sum exacted; for if the sum exacted be in excess, then to that extent, most incontestably, private property is assumed by the public. Nor, as to this excess, can it be successfully maintained that such imposition is legitimate as an exercise of the power of taxation. Such an imposition has none of the essential characteristics of a tax. We are to bear in mind that this projected improvement is to be regarded

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as one in which the public has an interest; the owners of these waste lands have a special concern in such improvement, so far as their lands will be in a peculiar manner benefited; beyond this, their situation is the same as that of the rest of the community. The consideration for the excess of the cost of the improvement over the enhancement of the property, within the operation of this act, is the public benefit: how, then, upon any principle of taxation, can this portion of the expense be thrown exclusively upon certain individuals? The expenditure of this portion of the cost of the work can only be justified on the ground of benefit to the public. I am aware of no principle which will permit the expenses incurred in conferring such benefit upon the public, to be laid in the form of a tax upon certain persons, who are designated, not indeed by name, but by their description as the owners of certain lands. A legislative act authorizing the building of a public bridge, and directing the expenses to be assessed on A, B, and C, such persons not being in any way peculiarly benefited by such structure, would not be an act of taxation, but a condemnation of so much of the money of the persons designated, to a public use. And, precisely in the same way, would an exaction of the cost of these works embraced in the act before us, so far as such cost exceeded the benefit to the lands improved, be an assumption of the money of a few individuals for an end purely public. Nor should it be overlooked, that if the scheme embraced in this act should be put in operation, and the expenses should exceed or equal the value of the land in its reclaimed condition, the inevitable result would be, that the public would acquire the benefits contemplated by the rescue of the land from its present idleness, but the owner of the land would lose his entire property. Every consideration of equity stands opposed to the admission of such a rule of taxation. Nor do I consider it any answer to this last objection, to suggest that there is no probability that the expenses of this improvement will equal the improved value of the land to be affected by it. It is clear, that the

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cost of the work and the value of the land in its altered condition, are not easy of estimation; it is certain, many enterprises of a similar character have proved abortive, and have brought great losses upon their projectors; and it is enough, therefore, to say, that the property owner cannot, without his consent, be made a party in the hazards of such an enterprise. If the assessment to which he is subjected had been restricted so as not to exceed the benefits received by him, he would have run no risk, because he could not have suffered any loss; but as this law is framed, his land may be taken from him, if the expenses of the project require the sacrifice. This, as has been already stated, would be, in my opinion, equivalent to a condemnation of the land, without compensation, for the public benefit, and as this may result from the natural operation of the statute, I am compelled to conclude that it is unconstitutional and void.

Thus far, this subject has been treated on general principles, and the deduction which has been drawn rests on those ordinary rules of justice which, to a considerable degree, form the basis of the social compact; but the result in this way attained has, it is conceived, the great weight of authority in its favor. In the *Matter of Canal Street*, 11 Wend. 154, Chief Justice Savage, referring to a proceeding to open a street in the city of New York, says: "If the assessment is confirmed and enforced, the owners of the adjacent property must pay beyond the enhanced value of their own property, and all such excess is private property taken for public use without just compensation."

The following adjudications are also in point in support of the doctrine that, in proceedings to effect public improvements, the assessment of expenses on the property in the locality of such improvement, must not exceed the value of the benefit conferred upon the land owner. *Matter of Fourth Avenue*, 3 Wend. 452; *Matter of Albany Street*, 11 Ibid. 149; *Matter of William and Anthony Street*, 19 Ibid. 678; *Matter of Flatbush Avenue*, 1 Barb. S. C. R. 286; *Nichols v. City of Bridgeport*, 23 Conn. 204.

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The same view has likewise, I think, been recognized and approved by the Supreme Court of this state. In *The State v. Mayor, &c., of Newark*, 3 *Dutcher* 185, two questions were presented; first of which was, whether an assessment made under the charter of the city of Newark, on certain houses and lots owned by the New Jersey Railroad and Transportation Company, for their share of the expense of altering and widening a street, was an imposition upon the company, within the meaning of the exemption from taxation contained in their act of incorporation. The assessment had been made as required by the municipal charter, among the owners of the houses and lots intended to be benefited by the improvement, in proportion to the advantage each had acquired. This assessment was held legal. In the opinion of Chief Justice Green, some of the decisions before referred to are cited with apparent satisfaction, and the doctrine that the assessment, in order to be legal, must not exceed the value of the benefits to the land owner, is adopted. "The theory," says this opinion, "upon which such assessments are sustained, as a legitimate exercise of the taxing power, is that the party assessed is locally and peculiarly benefited over and above the ordinary benefit which, as one of the community, he receives in all public improvements, to the precise extent of the assessment. If the assessment made upon the railroad company is to be regarded as an exercise of the power of taxation, without reference to the special benefit conferred upon the company, then clearly the assessment is illegal." And in the same case Mr. Justice Elmer, laying down the same rule, cites and places himself upon a similar train of authorities. "In the case of the *Canal Bank v. Mayor of Albany*, 9 *Wend.* 244, and in the *Matter of Albany Street*, 11 *Wend.* 151, the Supreme Court of New York," such is his language, "treat an assessment of property benefited by an improvement, made for the public use, as a taking of property for public use, and hold that the amount assessed must not exceed the benefit actually received." It will be observed, therefore, that the principle upon which *The State v. Mayor, &c., of Newark*, and the other cases referred to,

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are founded, is the same which has been taken as the guide in the present investigation. That principle is one of great importance; for if the burthens of the community can be thrown upon a small class, whose position is not peculiar or different from that of the rest of the people, there can be no security for private possessions. To permit individuals to be taxed to pay for a public improvement to the extent of the peculiar benefit which they receive from such improvement, is not unjust or inequitable; but any exaction beyond this, exclusively from such individuals, is an act which involves the ability, on the part of the community, to confiscate, for its own purposes, the property of the citizen. Such power has not, by the constitution of this state, been placed in the hands of the legislature; and as the act in question has, in the particular adverted to, exercised such power, it is in my opinion void.

Before closing this subject it should be remarked, that this case, with regard to the grounds on which it rests, is to be distinguished from that class of proceedings by which meadows and other lands are drained on the application of the land owners themselves. In the present instance, the state is the sole actor, and public necessity or convenience is the only justification of her intervention. But the regulations established by the legislative power, whereby the owners of meadow lands are compelled to submit to an equal burthen of the expense incurred in their improvement, are rules of police of the same character as provisions concerning party walls and partition fences. To these cases, therefore, the principle upon which the decision of the present case rests, is not to be extended. The decree of the Chancellor should be sustained.

The decree was affirmed by the following vote :

For affirmance—BEASLEY, C. J., BEDLE, CLEMENT, DALRIMPLE, DEPUE, ELMER, FORT, KENNEDY, VREDENBURGH, WALES, WOODHULL. 11.

For reversal—NONE.

Demarest v. Terhune.

MARCH TERM, 1867.

DEMAREST, appellant, and TERHUNE, respondent.*

1. If a debtor, in failing circumstances, convey his lands for a consideration apparently inadequate, to a creditor in payment of a debt due him, the burthen will be thrown on such creditor to show, by full proof, that such transaction was *bona fide*.

2. If the honesty of such conveyance be left in doubt, the sale will be set aside upon equitable terms.

3. Under the facts of this case, the conveyance was set aside, with directions that the land should be sold; the proceeds of such sale to be applied, in the first place, to pay the debt due to the creditor who held the conveyance, and after the payment of the costs of both parties, to the satisfaction of the judgment of the complainant.

The appellant in this court, being the complainant in the court below, was a creditor of Gilliam C. Terhune, and exhibited his bill to set aside a conveyance of certain lands, lying in the town of Hackensack, made by the said Gilliam and wife, to the respondent, Albert G. Terhune.

The gravamen of the bill is that this conveyance was for the nominal consideration, expressed in the deed, of \$3000, and that it was worth at least \$5000; that at the time of such conveyance, the said Gilliam, as was known to respondent, was indebted to the complainant; and the bill charges that the deed was voluntary and without consideration, and was made for the purpose of hindering and defeating the complainant in the collection of his debt, and to defraud him. Albert G. Terhune, in his answer, admits that he knew of the indebtedness above mentioned to the complainant, but denies that the deed to him was voluntary, or without consideration, or was in any way, directly or indirectly, made for the purpose of hindering or defeating the complainant, or any other creditor, &c.

The answer further stated that on the twentieth of No-

* CITED in *Jones v. Adams*, 8 C. E. Gr. 117.

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vember, 1863, Gilliam C. Terhune was justly indebted to him in the sum of \$2220, for money actually loaned and advanced by him, to the said Gilliam, before that time, and for which Gilliam give him a mortgage; that \$1000 had been paid on that mortgage, that afterwards Gilliam became indebted to him in the further sum of \$200, advanced by him for the support of his family; that said Gilliam had given a mortgage to Abraham Westervelt for \$1000, which mortgage had been assigned to respondent, and upon which there was due, at the time of making said deed to him, the sum of \$1194.64; that said lands were, at that time, subject to another mortgage, given by said Gilliam to Robert Campbell, for \$500, and that there was due on said mortgage, at the time of giving said deed, the sum of \$705.54; that further, said lands were subject to a judgment for \$78, which he had to pay; that the whole of his claim, together with the said encumbrances and interest thereon, amounted to the sum of \$3492.04, at the time of giving said deed, and that this made the consideration of said deed.

The case was heard by a master, sitting for the Chancellor, on the bill, answer, and proofs. The complainant's bill being dismissed on the merits, he brought this appeal.

The opinion of the master is reported *ante* p. 46.

Mr. C. H. Voorhis, for appellant.

Mr. L. Zabriskie, for respondent.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

A careful examination of the evidence in this case, has led me to the conclusion that the premises in question were conveyed to the respondent for a consideration which was below their real value. There appear to be strong reasons to justify the belief that, at a fair sale, these lands would have brought more than enough to pay all the liabilities of the grantor who, as matters now stand, is an insolvent. The

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respondent is the uncle of the grantor, and at the time of this transaction, was living in the same house with his wife and family. It is also shown that the debtor's personal property was under levy by execution, to an amount more than sufficient to exhaust it. The consideration alleged to have been given for the conveyance of the premises, was sundry debts said to be due to the respondent.

We are called upon, then, to deal in the first place with this conjuncture: A debtor having property which, at a fair valuation, is ample to satisfy all that he owes, transfers such property, by way of sale and payment, to one of his creditors; such creditor being a near relative.

No one, it is presumed, will deny that such a transaction is well calculated to excite suspicion and awaken vigilance. Its honesty is defensible only on the supposition that both vendor and vendee were ignorant of the value of the property transferred. The vendor, as against the just rights of creditors, could not give away his property, nor could any creditor, knowing the position of affairs, receive anything for which he did not give an equivalent. Such a conveyance can stand only on the ground of its entire *bona fides*, and the burthen of proof, in this respect, under such circumstances, is manifestly on the purchaser. The defence of the respondent is, that he took the property at what both he and the insolvent thought was a fair price; and this, as the claim defeats the equities of the case, he must establish by plain proof. Has he done this?

The price which the respondent in his answer says he and the debtor set upon the land, was \$3000. This is \$500 less than the valuation fixed by some of his own witnesses. The testimony on the part of the complainant places the value at from \$4000 to \$6000. It seems inexplicable, then, how the respondent and the debtor could, in sincerity, deem \$3000 the full worth of the land. They were both well acquainted with it; it had been the home of the debtor, and the respondent was living upon it at the time. It is true that the respondent in his answer avers that, in point of

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fact, he agreed to pay \$492.04 more than this for the premises. This increase he makes up by various items of indebtedness, which he enumerates. But the deed states the consideration at \$3000. Why was this, if it was greater? It is said that this amount was inserted in the deed, because this was the valuation at which the parties rated the property. But this is obviously a mere gloss, the whole purpose of the consideration clause being to express what the grantee pays for the land, not what he or the grantor values it at. It is difficult, in view of this statement of the deed, to resist the belief that the sum inserted was regarded at the time as a matter of no moment, from a consideration which will be indicated in the sequel. The clause expressing the consideration contained in the conveyance, is in the handwriting of the counsel of the respondent, and it is evident from his testimony in this cause, that he was not aware that the sum thus specified was not the agreed price. It is also certainly a notable circumstance, that an attempt is made to depart from the consideration stated in the written document, when such departure has become necessary to give a color of fairness to the transaction. Nor are these additional items of indebtedment, which are thus thrown in to swell the consideration, proved in a satisfactory manner. One of these items is described in the answer as the sum "of two hundred dollars, or *thereabouts*," which the respondent alleges he had advanced and paid, in the absence of the debtor, for the support of his wife and family. The only evidence of the truth of this assertion is this short statement in the answer. The respondent does not pretend he ever had any voucher for this debt; he does not even say the amount was ever ascertained on any settlement between himself and the debtor. He cannot specify, even in his answer, the precise amount due. He annexes no time to such alleged advances. He says they were made for the support of the family, and yet he shows he made the agreement for the purchase of the property in the month of June, 1864, while he admits that he received, in that same month, \$500 from the debtor, which he endorsed

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as a payment on his mortgage. Is it probable that he would have made this endorsement if this sum of \$200 had been due to him for which he had no security? There is also an evident error, to an extent exceeding \$100, in the calculation of the amount of interest due on one of the mortgages, and yet this error enters into, and forms part of, the aggregate amount which is specified, and which, it is alleged, was the actual consideration agreed upon. Such testimony as this is far too loose and indecisive to support an agreement which, in its results, is harsh and unjust. Nothing short of a perfect demonstration of the fairness of every item in this account of the respondent, would in my judgment, suffice. But, independent of this consideration, the important fact is admitted, that the respondent and the debtor, at the time of making this conveyance, actually fixed the value of the property at \$3000. In view of this fact, I am unable to believe that when they did this, they were dealing at arms' length, as vendor and vendee. It lacks the essential feature of a bargain and sale; the indication of a purpose, on the part of the seller, to obtain a fair equivalent for the thing transferred. I think it is obvious the affair rested on some other basis. And if anything were wanting to strengthen this belief, it would, in my opinion, be found in the curt and ambiguous statement of this alleged purchase, contained in the answer. The answer itself affords the entire proof upon the point, and yet it nowhere avers, in direct or explicit terms, that the debtor agreed to let the respondent have this land in consideration of the moneys due to him. But two clauses of the answer touch upon this subject. The first states, that the debtor did "execute a deed to this defendant, conveying to him said lands in fee, for the consideration of \$3000, therein expressed." It is obvious this averment relates merely to the sum expressed in the instrument; otherwise it is false, for the respondent afterwards alleges that this amount was not the price agreed upon. The other clause is in these words: "And this defendant further answering says, that the only object of said deed to him was

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to satisfy said sums so due to him, and that the said lands were not conveyed to him to defraud, &c., but that the same were taken by this defendant in payment of said debts to him," &c. In this there is no allegation that the debtor agreed to let him have the property in consideration of the debts due to him. He does say he took them in payment, but he fails to show any agreement to that effect. Upon this important point I regard the answer, if not evasive, at least as incomplete. This feature of the answer has a tendency to confirm the suspicions naturally incident to the respondent's case. The defence, being a hard one, must rest on the ground of strict legal right; it must be sustained, therefore, at all points, by the pleadings and evidence. If the facts are left in doubt, a court of conscience will mould them in a form subservient to the equities involved. This, it is apprehended, is the posture of the present case; the respondent should not, therefore, be permitted to retain the entire property, to the exclusion of the rest of the creditors, on the ground of being a purchaser for value.

But although of this opinion, it does not seem to me that the facts are such as must lead necessarily to the conclusion that the conveyance, at the time it was executed, was tainted with actual fraud. Such a judgment would be unnecessarily severe. There is but a shade of difference, sometimes, between the act of taking a conveyance of property as security for the payment of a debt which approximates the value of such pledge, and taking it in payment of such debt; so that, subsequently, that shade of difference may, perhaps innocently, be lost sight of by the parties. This, I think, has happened to this respondent. Probably the arrangement by force of which he took his conveyance, was loose and ill-defined; such is often the case; but the fair presumption, from all the facts of the case I think, is, that the purpose of such conveyance was to enable him to raise the money due him, by a sale, without the expense or delay of a suit in equity on his mortgage. This hypothesis is the most favorable one which can be raised up for the respondent, and may be, it seems to me,

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fairly deduced from the proofs. I shall not handle details. The evidence of Mr. Banta, who was the counsel for the respondent and was called by him as a witness in this suit, has a strong bearing in support of the view suggested. His statement is, substantially, this: that the respondent brought him his mortgage to have it foreclosed, and that he told him if he could get the debtor "to convey the property to him, it would answer the same thing, and save the costs of the foreclosure." To this the respondent replied, that he would go and see the debtor, and try and make an arrangement with him. So, of a similar complexion, is the testimony of Mr. Paulison. This gentleman refers to a conversation with the respondent, which took place after the property had been advertised for sale by the respondent. He says, in that interview, "I asked him whether, if the property was sold, he was willing that the overplus, if any, after satisfying his own claims, should go to pay the other creditors of the doctor (the debtor); that is, *whether he meant that*; and he said, certainly. I then said, that ends it, or it ought to end it, or words to that effect."

And again, we find the same idea in the evidence of Mr. Echerson. Referring to a conversation with the respondent, his words are: "I asked him how it was that he was in possession of this property, and I had a claim against the doctor; I think he told me the doctor owed him, and that, in the first place, he got a mortgage, and afterwards he got a deed; he spoke of the mortgage not being satisfactory, and that the property was now his; he said he did not want anything more than his claim."

This evidence, then, shows conclusively that the respondent was desirous of obtaining the payment of his debt; that with that view he took his mortgage to his solicitor for foreclosure, who advised him that if he could get a conveyance, it would answer the same purpose, and would be attended with less expense; that the respondent said he would endeavor to do this; that he succeeded in getting a conveyance; and that he told one witness that he meant the surplus, after he should

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be paid, to go to the other creditors; and that he stated to another, that all he wanted was his own money. In addition to this, it was further shown that, in point of fact, the respondent had no use for the property; that all he wanted was to make his money out of it, for he almost immediately advertised it for sale. From this series of facts, it seems to me to be plainly consistent with sound reason and good sense, to infer that the debtor executed the conveyance in question to his principal creditor, with an understanding, if not clearly expressed, at least tacit, that the latter would sell the property, and thus indemnify himself for the moneys due him.

Making then this deduction, I am brought to the result that the conveyance of these premises to the respondent was, to a partial extent, voluntary and without consideration. So far as the debt due to the respondent reaches, the conveyance was founded in value; beyond that, it had nothing to support it. As to this excess of the value of the land over the consideration to be given for it, the respondent should be held as a trustee for the creditors of the grantor. Plainly on this ground, therefore, the appellant is entitled to the aid of the court. Nor is the frame of the bill inapplicable to this aspect of the case. It proceeds upon the point of a conveyance, without consideration, and which was, on that account, a fraud upon creditors. The case laid, therefore, is partially proved; the conveyance, though not wholly, is in some degree voluntary, and is, thus far, constructively a fraud, delaying, and if not set aside or controlled, defeating creditors. I do not, consequently, find any difficulty, arising from the structure of these pleadings, in granting relief in the form above indicated. In the case of *Boyd v. Dunlap*, 1 *Johns. C. R.* 478, the bill, in its substance and general construction, was similar to the one under consideration, for it was founded on a complaint that a conveyance was voluntary, and was fraudulently made to defeat the complainant and other creditors. The evidence showed, as in the present instance, a partial, but not a full consideration; and Chancellor Kent concluded that there was sufficient ground for a

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limited interference, by allowing the deed of the real estate to stand as a security only for such consideration as had been shown. In applying this principle, he makes these pertinent remarks: "There appears to be very considerable inadequacy of price, even admitting the consideration expressed in the deed, and to allow the deed to stand as security for the true sum due, would be doing justice to the parties, and granting a relief which cannot be afforded at law. A court of law can hold no middle course. The entire claim of each party must rest and be determined at law, on the single point as to the validity of the deed; but it is an ordinary case in this court, that a deed, though not absolutely void, yet, if obtained under unequitable circumstances, should stand only as the security for the sum really due. A deed, fraudulent in fact, is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; but it is otherwise with a deed obtained under suspicious or unequitable circumstances, or which is only constructively fraudulent." The doctrine thus perspicuously expressed, is fully sustained by the cases cited; and it is manifest, such doctrine can never find a more appropriate application than to the facts now under consideration.

My conclusion is, that the appellant should have a decree in his favor in the court below, and that it should be referred to a master to ascertain the amount due to the respondent, and which sum should be declared a first lien on the said lands; and that said respondent, or a master in chancery, should be directed to sell said lands at public sale, and that the proceeds thereof should be applied to the payment of the said debt due to the respondent, with the interest thereon; and that, in the second place, out of the surplus, if any such there be, the taxed costs of both parties, as well in the court below as in this court, be paid; and in the third place, that the principal and interest due, or to grow due, on the judgment of the appellant, be paid.

Let the decree be reversed, and the case remitted with instructions in conformity with the above view.

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The decree was reversed by the following vote :

For reversal—BEASLEY, C. J., BEDLE, CLEMENT, DALRIMPLE, DEPUE, ELMER, KENNEDY, VAIL, VREDENBURGH, WALES, WOODHULL. 11.

For affirmance—FORT.

JUNE TERM, 1867.

TITUS, appellant, and PHILLIPS, respondent.

1. Where a grantor places a deed in the hands of a third party, together with a due-bill, with instructions not to deliver the deed to the grantee until he should sign the bill, and the deed was delivered to the grantee without his being required to sign the bill, and accepted by him under the honest belief that the amount of the encumbrances which he thereby agreed to assume was the whole consideration, it is a case of mutual mistake of fact, against which a court of equity will relieve.

2. An action at law for the amount of such due-bill, being a part of the consideration of the deed, will not be construed an affirmance of the delivery, and estop the grantor from setting up that the deed was not his, where it clearly appears that the deed was delivered to the grantee without the authority of the grantor, and that the circumstances under which the delivery was made were not known to the grantor until the trial of the action at law.

The opinion of the Chancellor is reported *ante p.* 77.

Mr. B. Van Syckel, for appellant.

Mr. Kingman, for respondent.

The opinion of the court was delivered by

DALRIMPLE, J.

The following statement of facts, I think warranted by the pleadings and proofs in this case :

In March, 1861, the complainant made a deed to defend-

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ant, for a farm of complainant, situate in the county of Mercer. The deed was handed by complainant to Mr. Andrew R. Titus. The complainant delivered to Andrew, with the deed, a note or due-bill, payable to complainant, with instructions to deliver the deed to defendant on his executing the due-bill, and delivering the same to him, Andrew, for the complainant. The due-bill was required as the consideration of the conveyance. Andrew is the brother of complainant, and son-in-law of defendant. Contrary to the instructions of the complainant, Andrew delivered the deed without requiring of defendant the due-bill. The defendant retained the deed for some time, as if uncertain whether to claim title under it or not; but finally got it recorded, and claimed that it had been duly delivered to him. The complainant, after vainly endeavoring to procure either the due-bill or a return of the deed, brought an action in the Circuit Court of Mercer, for the \$2510 which he was to have received by way of consideration for the conveyance of the premises in question. He was defeated in that action, on the ground that Andrew, neither before nor at the time he passed over the deed, informed defendant that the execution of the due-bill was required as a condition precedent to the delivery of the deed. The defendant maintained, that from some conversations or negotiations which had previously taken place between him and the complainant, the defendant had good reason to believe, and did believe, that the only consideration required to be paid for the conveyance, was the amount of encumbrances then on the property; the payment of which the defendant was, by the deed, made to assume. Failing in his action at law, the complainant brought this suit, the object of which is to compel a re-conveyance by defendant of the premises in dispute, on re-payment to him of all costs and expenses incurred for improvements, over and above the rents and profits received.

If the defendant, as he alleges, accepted the deed in good faith, under the honest belief that the complainant was willing to convey the property to defendant on his assumption of the encumbrances merely, and the complainant, on the other

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hand, entrusted the deed to his brother, Andrew, with instructions not to deliver it without execution by defendant of the due-bill, and Andrew, without communicating to the defendant these instructions, but in violation thereof, made delivery of the deed, it is a case of mutual mistake of fact, against which a court of equity is bound to relieve. The instructions of complainant to Andrew to require the due-bill as the consideration of the conveyance, were in the nature of a condition precedent, on performance of which, Andrew's right to deliver the deed depended. Without the performance of that condition, no valid delivery could be made. The deed having been handed over to defendant without the performance of that condition, on which his right to receive it depended, he cannot claim that, in law, it is the deed of the complainant. It is not. The delivery was nugatory as against the complainant. Under these circumstances, it is manifestly inequitable for the defendant to claim title to the property.

It is said that the complainant, having brought an action at law for the consideration money, has thereby affirmed the delivery, and is now estopped from setting up, in a court of equity, that the deed is not his. I do not think so. The action at law was predicated on the facts respecting the consideration, as complainant understood them. He had a right to presume that these facts had been communicated by Andrew, his agent in that behalf, to the defendant. On the trial of that cause, the complainant was surprised to learn that Andrew had not advised the defendant of the condition on which the deed was to be delivered. The defence there was put upon the ground that the defendant, not having agreed to pay more for the property than the encumbrances, and nothing having passed at the time Andrew handed over the deed, from which a contract to pay more could be implied, the plaintiff could not succeed, even though the instructions had been given to Andrew not to deliver the deed without receiving the due-bill. In other words, the defendant contended that he could not be held to have accepted the deed

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on the terms fixed by complainant, inasmuch as those terms had never been communicated to him. There being no evidence that Andrew had informed defendant of complainant's terms of sale of the property, the verdict and judgment passed in favor of the defendant. But I cannot admit that the result of that suit fixed the right of the defendant to the property, if this court is satisfied, as we are, that the deed was handed by Andrew to the defendant, without the authority of complainant. If such were the effect of the verdict and judgment at law, the result would be, that the complainant, without any laches on his part, would lose his farm. By the record, the defendant holds the legal title to the farm in question. The deed under which he claims is not the deed of the complainant, because no delivery thereof, binding on complainant, was ever made. I can see no ground upon which the defendant can stand in a court of equity, in defence of his claim to this property. He has neither paid, nor proffered to pay for it. He was notified immediately after he got possession of the deed, that he must either return it or execute and deliver the due-bill. He did neither. He must do one or the other, or the result as already stated will be, that he will acquire title to a farm without paying for it, and against the will of the owner. When the complainant brought his action at law, he presumed, as he had a right to do, that the defendant understood, when he took possession of the deed, what were the complainant's terms of sale. The agent who was entrusted with the deed, handed it over without exacting compliance with, or even stating, those terms of sale, and therein exceeded his authority. The act was not the act of the principal, and he is in no wise bound thereby. He could have filed a bill in chancery at once, and have compelled a re-delivery of the deed, or at least payment of the consideration money, which he instructed his agent to exact. The action at law having been prosecuted under a mistake of facts, should not be allowed to prejudice the complainant's case in a court of equity. The complainant cannot be held to have adopted, as his own, the delivery

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by Andrew, when it appears that the circumstances under which that delivery was made, were not known to complainant till the trial in the Mercer Circuit.

In the case of *Black v. Shreve*, 2 *Beas.* 455, it was held that a deed, to be valid, must go into the hands of the grantees with the consent of the grantors. The defendant in this case cannot claim the position of a *bona fide* holder of the deed for value, if that would avail him under the circumstances. In the first place, he has paid nothing; and in the second place, the consideration expressed in the deed advised him of the exact amount for which the grantor was willing to make the conveyance. Besides, the defendant's conduct, at the time of, and subsequent to, the delivery of the deed, shows that he had some misgivings at least, as to the propriety of claiming title to the property, without paying the complainant's price.

The complainant is entitled to a decree, with costs, in this court and in the court below.

Under all the circumstances, I think it right that the defendant should have the option, either to pay the \$2510, with interest from the date of the due-bill, and retain the property, or to re-convey the property on payment for his permanent improvements, less the rents and profits received. The defendant should be allowed, in taking the account of the rents, profits, and improvements, all moneys, principal or interest, which he may have paid on the encumbrances referred to.

The decree in chancery must be reversed, and the cause remitted to that court, to the end that the decree of this court may be carried into effect, according to law.

The decree was reversed by the following vote:

For reversal—BEDLE, CLEMENT, DALRIMPLE, DEPUE, ELMER, FORT, KENNEDY, OGDEN, VAIL, WALES. 10.

For affirmance—WOODHULL.

Rar. & Del. Bay R. Co. v. Del. & Rar. Canal and C. & A. R. & T. Cos.

NOVEMBER TERM, 1867.

THE RARITAN AND DELAWARE BAY RAILROAD COMPANY
and THE CAMDEN AND ATLANTIC RAILROAD COMPANY,
appellants, and THE DELAWARE AND RARITAN CANAL
AND THE CAMDEN AND AMBOY RAILROAD AND TRANS-
PORTATION COMPANIES, respondents.*

1. The several legislative acts giving to the Camden and Amboy Railroad and Transportation Company the exclusive franchise to carry passengers and goods between the cities of New York and Philadelphia, in part by means of a railroad across the state, examined, and *held* to be constitutional and valid, as a contract between the state and the company.

2. A state has the exclusive control over the construction and maintenance of railroads and other internal improvements within her own domain.

3. The right to build and use a railroad for the public use, is a franchise, the right to which can be derived from the sovereign only.

4. Such franchise, in its nature and in the absence of express provision, is exclusive, except against the government; so that a competing road, established without legislative authority, will be enjoined.

5. As a consequence, *held* that the Raritan and Delaware Bay Railroad Company being wrong-doers in diverting their road from their charter route, and in acquiring a right of way to Camden by agreement with the Camden and Atlantic Railroad Company, will have no right, unless they shall acquire supplementary powers, to set up a competing line with the complainants, even after first of January, 1869, when what is called the monopoly privilege of the complainants comes to an end.

6. The injunction against the defendants continued and extended, and the decree of the Chancellor in other respects affirmed.

The opinion delivered in the Court of Chancery in this cause is reported in 1 *C. E. Green* 356.

The final decree in that court is as follows:

This cause coming on to be heard at the Term of October, 1863, before his Honor, Henry W. Green, Chancellor of the state of New Jersey, at Trenton, upon the pleadings and proof in said cause, and having been duly argued by the coun-

* CITED in *Erie R. Co. v. D., L. & W. R. Co.*, 6 *C. E. Gr.* 286; *Carlisle v. Cooper*, 6 *C. E. Gr.* 581; *Black v. Del. & R. Canal Co.*, 7 *C. E. Gr.* 402, 417; *Penn. R. Co. v. National R. Co.*, 8 *C. E. Gr.* 446; *Horse R. Co. v. Citizens Coach Co.*, 1 *Stew.* 147; *McGregor v. Erie R. Co.*, 6 *Vr.* 97; *N. J. Southern R. Co. v. Long Branch Comm'rs*, 10 *Vr.* 31.

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sel of the said parties, and the Chancellor having taken time to advise thereon until the Term of February, 1864, when further time was taken to settle the form and terms of the decree then pronounced, and now at this time, that is to say, on the sixteenth day of May, 1865, the Chancellor is of opinion, that by virtue of the acts of the legislature of the state of New Jersey, bearing date the second day of March, 1832, and the sixteenth day of March, 1854, in the pleadings in this cause mentioned, and the acceptance thereof by the complainants, the state of New Jersey entered into a valid contract with the said complainants, which is now subsisting and in force, to wit, that it should not be lawful before the first day of January, 1869, to construct any other railroad or railroads in the state of New Jersey, without the consent of the said complainants, which should be used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business between the said cities with the railroads of the complainants, or that might in any manner be used or intended to be used for the purpose of defeating the true intent of the act of March the second, 1832, or the act approved March sixteenth, 1854, in the pleadings in this cause mentioned, that the intent of said contract was fully and effectually to protect, until the first day of January, 1869, the business of the said complainants from railroad competition, between the cities of New York and Philadelphia; that the said business to be protected from competition is the through business from city to city, and not the transportation of freight and passengers, to and from points and places within the state of New Jersey along the line of the respective roads, and between those points and the cities of New York and Philadelphia respectively. And the Chancellor is further of opinion, that the said contract and the said acts of the legislature are not repugnant to, or in violation of, the constitution of the United States or of this state, or the rights and privileges of the said Camden and Atlantic Railroad Company, or of the said Raritan and Delaware Bay Railroad

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Company, as granted to them in and by their respective charters, or any acts supplementary thereto, and that the said defendants are bound to respect the said contract, and not to violate the same.

And the Chancellor is further of opinion that the incorporation of the Camden and Atlantic Railroad Company to construct a railroad across the state from Camden to the sea, at or near Absecom inlet, and the incorporation of the Raritan and Delaware Bay Railroad Company to construct a railroad from Raritan bay to Cape Island, were no violation on the part of the state of their contract with the complainants; that the junction of the Camden and Atlantic railroad with the Raritan and Delaware Bay railroad, at their necessary and legitimate point of intersection, so as to form a continuous, though circuitous line of railway from Camden to the Raritan bay, and which, with the aid of steamboats from the Delaware river and Raritan bay, will form a continuous line, and which, by possibility, may be used for the transportation of passengers and merchandise across the state between the cities of New York and Philadelphia, constituted no violation of the complainants' rights.

And it appearing to the satisfaction of the Chancellor, that arrangements have been entered into with direct reference to the formation of a continuous line of transportation between the cities of New York and Philadelphia, and that the transportation of freight and passengers from city to city is carried on over the defendants' roads by their co-operation and with their knowledge, and under and by virtue of agreements entered into between themselves and with others, and that the railroads of said defendants are used for the transportation of passengers and merchandise between the cities of New York and Philadelphia and are competing in business with the roads of the said complainants, in direct violation of the contract made by the state, and of the rights and privileges of the complainants, and that the complainants have in no wise acquiesced in such conduct of the defendants, nor consented thereunto; the Chancellor is further

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of opinion, that the said acts on the part of the said defendants are a violation of the exclusive rights and privileges of the said complainants; and that the complainants are entitled to relief, and to the aid of this court, and the protection of such rights and privileges, and to an account of all such use of said railroads and branches and of such transportation, and to the damages they have sustained by such violation of their said exclusive franchise, and to the injunction prayed for in their supplemental bill, with their costs to be taxed.

Therefore, the Chancellor doth order, adjudge, and decree that the said defendants and their confederates, their and each of their officers, contractors, servants and agents, do absolutely desist and refrain from further transporting, or aiding or assisting in the transporting of passengers or merchandise from city to city, between the cities of New York and Philadelphia; and that the said defendants, the Raritan and Delaware Bay Railroad Company and the Camden and Atlantic Railroad Company and their confederates, contractors, and agents, desist and refrain from further permitting or allowing their respective railroads, engines, cars, or machinery, to be used for the purpose of carrying on such transportation of passengers or merchandise from city to city between the said cities, or for the purpose of aiding or assisting in the transportation of passengers or merchandise between the said cities from city to city; and that the said corporation defendants, their confederates, contractors, and agents, severally desist and refrain from forwarding, and from aiding or assisting to forward, and from permitting or allowing to be forwarded by way of the said railroads and branches, or any part thereof, from any point or place in this state to any other point or place in this state, any passengers or merchandise which are or may be in the course of transportation from city to city between the said cities of New York and Philadelphia; and that all the said other defendants desist and refrain from aiding and abetting the said corporate defendants, or either of them, in any such forwarding passengers or freight; and that the defendants, and each of them, together with their confederates, con-

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tractors, and agents, desist and refrain from doing any act or acts for or towards or in aid of the transportation of passengers, freight, or merchandise between New York and Philadelphia by way of said railroads, or either of them, or any part thereof, or said branches, either by using or permitting to be used the different sections thereof for that purpose in connection with each other, or by using the said railroads, or any part thereof, or said branches, in connection with any steamboat or steamboats; and that the said corporation defendants desist and refrain from permitting their respective roads, or any section or sections thereof, to be used for any such last mentioned purpose; and that said defendants respectively, and their confederates respectively, desist and refrain from performing, aiding, or contributing to the transportation of passengers or freight from city to city aforesaid across the said railroads, or any part thereof, and upon steamboats running in connection therewith, by any other device or contrivance whatsoever; and that an injunction do issue out of and under the seal of this court, directed to the said defendants and their confederates, their and each of their officers, agents, contractors, servants, and workmen, commanding and enjoining them, and each and every of them, that they, and each and every of them, desist and refrain from the acts aforesaid, which by this decree it is ordered, adjudged, and decreed they shall desist and refrain from doing. And it is further ordered, adjudged, and decreed, that the said defendants do pay to the complainants their costs of this suit to be taxed, and the damages sustained by the complainants by the unlawful acts of the defendants; and that it be referred to James Wilson, esq., one of the masters of this court, to take an account of all passengers and freight carried on the railroads of the said corporation defendants, or on any part thereof, in course of transportation from city to city aforesaid, distinguishing what passengers were soldiers, and what freight was horses or munitions of war, transported by order of or for the use of the government of the United States, and to take an account of and ascertain the damages

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sustained by the complainants by the violation of their exclusive franchise by the defendants; and that the parties be examined before the master, and that the master proceed with all convenient speed; and that the defendants pay to the complainants as well their costs in this suit to be taxed, as the damages aforesaid, and that the complainants have liberty to apply on the foot of this decree in case of further violation of said exclusive franchise by any device or means whatsoever, and all further equity is reserved until the coming in of said report.

The Raritan and Delaware Bay Railroad Company, and the Camden and Atlantic Railroad Company, have appealed from so much of said decree as orders an injunction to be issued, and an account to be taken against them.

The Delaware and Raritan Canal and the Camden and Amboy Railroad and Transportation Companies, have also appealed from said decree, on the following grounds:

That the Court of Chancery hath omitted and refused to decree therein that the branch railroad from Atsion to or near Jackson is an illegal structure, and should be discontinued and broken up, and that it be taken up accordingly, or to that effect; that the Court of Chancery hath omitted and refused to decree that the Raritan and Delaware Bay railroad, south of Ocean county, is an illegal structure, and should be taken up, and that it be taken up accordingly, or to that effect; that the said decree, in effect, declares that the junction of the Camden and Atlantic railroad with the Raritan and Delaware Bay railroad, at their necessary and legitimate point of intersection, so as to form a continuous, though circuitous line of railway from Camden to Raritan bay, and which, with the aid of steamboats upon the Delaware river and Raritan bay, will form a continuous line, and which, by possibility, may be used for the transportation of passengers and merchandise across the state between the cities of New York and Philadelphia, constituted no violation of the complainants' rights; also that the court hath decreed that

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the complainants are not entitled to freedom from competition in their way business, as well as through business.

The appeals were argued by

Mr. Williamson and *Mr. Browning*, for the Raritan and Delaware Bay Railroad Company and the Camden and Atlantic Railroad Company.

Mr. J. P. Stockton, *Mr. Gilchrist*, and *Mr. Bradley*, for the Delaware and Raritan Canal and Camden and Amboy Railroad and Transportation Companies.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

The united Delaware and Raritan Canal and Camden and Amboy Railroad Companies were the complainants in the court below, and their object in appealing to that tribunal was to ask its aid in protecting them in the enjoyment of certain rights which they claimed to have derived from the state. The claim thus made was rested, in the main, on the acts of March second, 1832, and March sixteenth, 1854. In the second section of the former of these statutes, it is provided as follows: "That it shall not be lawful at any time during the said railroad charter, to construct any other railroad or railroads in this state, without the consent of the said companies, which shall be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroads authorized by the act to which this supplement is relative."

By the first section of the act of the sixteenth of March, 1854, it is enacted: "That after the first day of January, in the year eighteen hundred and sixty-nine, it shall be lawful, without the consent of the said Delaware and Raritan Canal and Camden and Amboy Railroad and Transportation Companies, to construct any railroad or railroads in this state for

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the transportation of passengers and merchandise between the cities of New York and Philadelphia, or to compete in business with the railroads of the said joint companies, without thereby in any wise impairing the right of the state to its stock in the said joint companies, or either of them, or to the transit duties which the said joint companies are now required to pay to the state; and that it shall not be lawful, before the said first day of January, eighteen hundred and sixty-nine, to construct any other railroad or railroads in this state, without the consent of the said joint companies, which shall be used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business between the said cities with the railroads of the said joint companies, or that may in any manner be used, or intended to be used, for the purpose of defeating the true intent and meaning of the act passed March second, eighteen hundred and thirty-two, and entitled a supplement to an act entitled 'an act relative to the Delaware and Raritan Canal and the Camden and Amboy Railroad and Transportation Companies,' or of this act; which intent and meaning are hereby declared to be fully and effectually to protect, until the first day of January, eighteen hundred and sixty-nine, the business of the said joint companies from railroad competition between the cities of New York and Philadelphia."

In exchange for the privileges thus bestowed upon these companies, the state had, to some extent at least, received a consideration of value; for, by the original charter, the railroad was declared to be a public highway, and the right to subscribe for one fourth of the capital stock of the company, and the privilege to take the road at an appraisement after the expiration of thirty years, were likewise reserved. In addition to these advantages, the state was subsequently made the recipient of a large number of shares of the capital stock of the joint companies.

That these several acts embody a contract between the state and the complainants, is obvious. Nor is there any

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more uncertainty with regard to the fact that by force of such contract the business of the Camden and Amboy Railroad and Transportation Company, between the cities of New York and Philadelphia, was meant to be protected until the first day of January, eighteen hundred and sixty-nine. To this extent, the theme of discussion is free from all doubt or obscurity. Whether, by force of the clauses of the compact above cited, or of any other provisions of the company's charter, or its supplements, its local business, intermediate the two cities just designated, is protected from competition, is a question which does not appear to me to be involved in the issues at present to be decided, because I regard it to be clear, that the road of the defendants cannot justly be considered as possessed of such a character. To make the road of the defendants liable to challenge from the incident of competition in local business, it would be necessary that such rivalry should, from its extent, be material; but as this, in the present instance, cannot be predicated, the controversy as to the complainants' right to interdict that kind of interference does not arise. This point is, therefore, dismissed from the consideration of the case.

Such are the franchises claimed by the complainants, derived from the grant of the sovereign power.

The defendants, on their part, have not called in question the fact of this grant, nor do they deny that, by a true construction of the compact, the scope above indicated is to be given to it; but their position is, that the grant itself is illegal and void.

The views of counsel upon this branch of the subject were presented under several heads.

I. It was insisted that this grant of exclusive privileges must be deemed invalid, on the ground that a certain arrangement, which the state had made with the joint companies, touching certain duties to be paid to the state in lieu of taxes, was in conflict with the power of Congress to regulate commerce between the states, by force of the Constitution of the United States.

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The statutory provision, contained in a supplement to the charter of the company, to which this objection principally relates, is in the words following: "That the said company shall pay to the state the sum of ten cents for each passenger carried on the said railroad or roads across this state, between Delaware bay and Raritan bay; said payments to commence when the said road is so far completed that passengers are transported thereupon across the state, instead of a ratable tax, as reserved in the said act of incorporation." These statutes relating to the company likewise contain a provision establishing a commutation of taxes for a prescribed rate of duty on all merchandise to be transported over this line of railroad.

The argument founded on this state of facts was this: that the duty thus stipulated was a burthen imposed almost exclusively on passengers and goods carried over this state from New York to Pennsylvania, and that a discrimination was thereby made against this inter-state commerce, in favor of the internal commerce of this state.

In support of this contention, the decision of this court in the case of *The Erie Railway Company v. The State*,* was, in a great degree, relied on. But it seems to me that the case now before us is clearly distinguishable, in principle, from the case cited. In the case of the Erie railway, the statute complained of imposed a tax on the business in this state of foreign corporations, requiring every such company to pay a certain transit duty on every passenger and on every ton of merchandise transported in this state, by or for such company, on any railroad or canal, for any distance exceeding ten miles, except passengers and freight transported exclusively within this state. The disputed tax had fallen upon goods which it appeared had, in the main, been carried over this state from and to adjacent states. That tax was held by this court to be illegal, for the reason that it was a burthen placed by this state on the commerce between the states. But it will be observed that in the decided case the tax adjudged to be void was placed upon foreign corporations. It

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is true that it was in the form of an impost on the business of such corporations done in this state, but then that business was simply the commercial act of transporting goods and passengers over this state. All, therefore, that was within the reach of the taxing power of this state, was this commercial act between the states, and it was this act that was taxed. So, too, there was a clear discrimination against the goods transported from state to state; for the act expressly exempted from all burthen, all transportation done by or for these foreign companies within this state. It was evident, therefore, that in the strictest sense this tax was a pure transit duty; a mere tribute exacted from foreigners for the privilege of passing over the territory of this state.

Such, in brief, was the case referred to, and the present one is its opposite in every respect which is essential to the constitution of a legal dissimilarity. The Camden and Amboy Railroad and Transportation Company is a domestic, and not a foreign corporation. As such, it was competent for the legislature and such corporation to agree as to the amount of tax which should be paid. So, too, almost all the property of this company is here, and, for every purpose of taxation, this state is its proper domicil. Here, then, unlike the instance of the Erie Railway Company, are property and franchises of immense value, which can be, beyond all question, legitimately taxed.

Nor does the act in question discriminate, as it seems to me, in any material degree, to the advantage of the citizen of this state. The tax is laid on residents and non-residents alike; citizens of this state, by force of its operation, have neither immunity nor preference. Nor is there any reason to suppose that there was any design to set this tax, by way of discrimination, on the citizens of other states, or that, in point of fact, such tax is unjustly borne by that branch of the business of the company. That such was not the purpose appears to be evident, from the fact that the company are not authorized to charge this tax in addition to the ordinary rate of fare which is prescribed in their charter. That

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rate of fare is uniform; the same maximum rate being fixed for both domestic and foreign transportation. The passenger carried from point to point by this road, within this state, cannot be charged beyond a certain sum per mile, and the citizen of another state, in crossing the state, is under the same protective limitation. The ten cents which the company is required to pay the state, for every passenger carried over the state from Amboy to Camden, cannot be charged by the company in augmentation of the fare of such passenger. In this condition of affairs, I can perceive no trace of a design to exact a premium from foreigners for the privilege of crossing this state. The arrangement was simply this: as between the state and the company, a charge of ten cents for each passenger transported across the territory of the state was to be paid; this was adopted as the measure of taxation; but the company was not authorized to charge against such foreign passengers any part of such tax. In this system nothing is observed which, like the law impeached by the Erie Railway Company, extorts from the resident of other states a price for the right to cross this state, either in person or with his goods. The form of the tax may be, and probably is, unfortunate; for to those who look at the surface of things only, it doubtless seems to make an invidious distinction between citizens of this state and citizens of other states; but is believed it would be difficult to prove that the tax in question falls more heavily upon non-residents than would the same amount of tax imposed on the road bed or on the rolling stock of the corporation. In such event, as the larger part of the business of the company is drawn from abroad, it would be the citizens of other states who would pay the greater part of such tax, for every tax upon the company must increase the cost of transportation, and must be paid by those for whom such business is done.

Hence, this first objection does not appear to me to be a solid one.

But before dismissing this branch of our inquiry, there is

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another view which should not be passed without notice. It is this: that this question, touching the validity of the arrangement of the complainants with the state, with regard to the mode of taxing the business of the company, has no proper application to this case. For, conceding the contention of the defendants on this point, what would be the result? Would it be anything more than this: that the imposition of the tax, in the mode prescribed, would be invalid, but that such invalidity would not affect the remaining terms of the contract between the state and the company? The argument of the counsel of the defendants, in this particular, proceeded on the idea that if this ingredient of the contract should be found to be unconstitutional, it would taint the whole agreement, and would thus invalidate those clauses which stipulate for the exclusive franchise. But the fallaciousness of this assumption at once becomes evident, when we perceive that if the principle be admitted it will go the length of annulling the entire charter of the company; for if that part of the grant guaranteeing the exclusive privileges, be void in consequence of the stipulation with regard to a duty in lieu of taxes, what other provision of the charter can, by any correct course of reasoning, be conserved? The proposition that a stranger to a contract can treat it as void, in every particular, because one of its terms contravenes a constitutional provision, is not, in its universality, true as a principle of legal science. The doctrine, whenever it exists or is applicable, is founded in considerations of public policy, and its whole value proceeds from its efficacy to repress bargains which have been entered into against positive law. But I am not informed that in any case which has heretofore been decided, this rule has been applied to the charters of incorporated companies, and indeed it is to be confidently anticipated that such an application will never be sanctioned. There can be no question that where an unconstitutional provision affects injuriously the rights of an individual, such party affected may defend himself on the ground of its illegality; but this concession falls far short of the position con-

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tended for, which is, that an individual, not interested in the provision which is unconstitutional, can explode those other terms of the charter which, considered in themselves, are obnoxious to no legal objection. Suppose, for example, a charter of a railroad corporation provides for the acquisition of lands required for the enterprise, in all cases upon compensation, except with regard to a single person, whose lands are authorized to be taken without compensation; clearly this exceptional provision would be unconstitutional, but could it be reasonably pretended, that on this account the other terms of such charter would be invalid? The argument in favor of the defendants must stand or fall by this test. That argument maintains that the clause giving an exclusive privilege to the complainants, and which clause is set up against them, is void, not intrinsically considered, but because the mode of taxing the complainants with which they have no concern in this suit, is void.

The argument fails unless the proposition be true that a charter, from the presence of a single unconstitutional feature, is, as an entirety, defeasible at the instance of any person who may call it in question collaterally. The ground upon which this proposition was sought to be sustained was, that a contract which embraces any stipulation against sound morals or positive law, will not be judicially enforced. But this rule is not apposite, for the rights in question do not rest in mere contract. It is true that many of the terms of the charter of an incorporated company are regarded in law as forming a compact between the state and the donee of the grant; but it is likewise true that in all other respects such charter is possessed of all the efficacy of ordinary legislation. Between the company and the state a contract is formed; but with regard to strangers, the legislature, in creating a charter, enacts a law. When the right to take lands for the uses of the incorporation is conferred, such right becomes indefeasible on constitutional grounds, because the company becomes vested with such right by the legislative agreement; but the land owner must yield up his lands,

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not on the basis of such agreement, but in obedience to a statute. And in the same manner, when this law, now drawn in question, has created this exclusive privilege, the defendants are called upon to submit to it as a law enacted in due course of legislation. Regarded from this point of view, the objection above considered disappears from the discussion, for it is clear that, by the rules of statutory construction, a law is never avoided as a whole, by reason of an illegality in one of its provisions. The same general law, therefore, which protects all the other rights of the complainants will protect the prerogative in dispute, which is as much a part of their organization as is their capacity to have perpetual succession. In my opinion, it would be just as competent for the defendants in this suit to dispute the corporate existence of the complainants as to gainsay, on the ground above considered, the existence of their exclusive franchise; for the one as well as the other is secured by the same law.

II. But again, in the second place, it was argued that the grant of the exclusive privileges to the complainants was invalid, from the fact that, by force of such grant, the legislature bound itself not to make, or permit to be made, any other railroad across this state, which could be used in the course of trade between the cities of New York and Philadelphia, for the period of thirty years. The ground of this insistent was, that this arrangement was, essentially, a regulation of inter-state commerce, confining it, during the period specified, to a single channel of inter-communication.

In the consideration of this point, it is to be remembered that we have to do with legal objections only. The solution of the question does not depend, in any degree, on the fact of what is due, under the obligations of international comity, from one state of this nation to another state. Nor is it to be affected by a consideration of what line of conduct a state should adopt from the dictates of a wise or generous policy. It may well be conceded, as it is conceded to the fullest ex-

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ment, that it is the part of wisdom as well as an exhibition of a spirit of becoming amity for each state to afford to every other state all reasonable facilities for commerce and mutual intercourse within her power. But these are duties evidently emanating from the international code—the *jus gentium*. They are not, in the sense of being enforceable, legal duties, and consequently, their correlatives are not legal rights. One state cannot, as of right, demand that a certain mode of passage shall be provided for her citizens and their property by any other state. It follows, therefore, inevitably, that the power of each state over the construction of her own roads and other internal improvements, is, so far at least as her own action is concerned, entirely supreme. No state can be compelled to make a railroad, or canal, or ordinary highway. Nor can she be compelled to keep up or in repair those highways or improvements which she may have constructed or authorized. It would be difficult to find any legal impediment, within the power of other states, or of the United States, which could be interposed so as to prevent this state, in the exercise of her pleasure, from closing up, or forbidding the use of any highway within her domain. This is a branch of government which has been administered exclusively by the state authorities, from the formation of this people as a nation to the present day; and so far as is known, the right has never been called in question. If, then, a state has the undoubted right to exercise a discretion, and either to build or to refuse to build any given road, why is she forbidden to agree not to build, nor permit to be built within a definite period, a road between certain termini? Whether a given road be at present required, is, it will be admitted, a question which addresses itself to the discretion, purely, of the legislative department of the state government. Nor will it be denied that the decision of such department, on that matter, will be final. How, then, can it be said that the question, whether a second or other road may become necessary in the future, within a certain limit of time, is not to be referred to the same discretion? The

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argument was, that the agreement of the state not to permit the construction of a railroad within the time designated, condemned commerce, during such interim, to one channel. But suppose, in the absence of any such conventional restriction on the power to enact laws, a second road had been applied for, and the legislature had refused, as it legitimately might, to authorize the improvement, would not, in the same sense, such refusal have been a regulation of commerce? For the time being, it would have compelled commerce over the state to pursue one line of communication; it would have refused it a second avenue; and, on the basis of the argument advanced on this topic, would have been an unconstitutional regulation of commerce. I think it must be conceded that a refusal to do, or an agreement not to do that which cannot be legally exacted from a state, cannot, in the nature of things, be a violation of any law, either the law of the constitution or the general law of the land. The argument in behalf of the defendants, on this subject, is founded in the fallacy that each state is under a legal obligation to give to every other state the facilities requisite for inter-state commerce. But this assumption has no foundation in any of the regulations by which the states are constitutionally bound together. There is no provision nor any indication in the Constitution of the United States, to the effect that one state, as a matter of positive duty and by way of special provision, shall give a right of passage over her territory to the citizens of another state. Nor would the provision, if such existed, be a wise one. Indeed, it seems scarcely possible to present to the imagination, an obligation which would have a greater tendency to introduce the most inimical dissensions. If a state has a constitutional right to demand a transit way over the territories, adjacent or distant, of other states, where would be the beginning, or the end, or the limit, to such claims? What would be full performance, by the servient state, of such an obligation? What tribunal could arbitrate, in a satisfactory manner, between such perplexed

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and indefinite interests? There is every reason to believe that such a doctrine would lead to an inharmony and collision of opinion, which would be attended with the worst consequences to the nation. But, fortunately, there is no such obligation due from a state to a state; and, as a consequence, each state is free to make, to refuse to make, or to agree not to make, railroads or other improvements on her own domain, at her pleasure. The only obligation of a state, in this respect, is, to allow the citizens of other states to use equally with her own citizens, such roads or highways as in her discretion she may see fit to construct.

Nor is this obligation at all likely to prove inefficient in compassing the end for which it was designed, for under its operation one state cannot construct a railroad, or other similar improvement, without increasing in the same degree the avenues of commercial communication for the use of the citizens of every other state, and thus the intercourse between the states is placed under the shelter of the all-sufficient law of social development. A state that provides for her own citizens the means for internal commerce, must, almost of necessity, provide the means of inter-state commerce for the citizens of other states. That a state will ever withhold such means from her own people, it is not reasonable to suppose, and, consequently, she will not refuse such means to the citizens of other states; and it is upon this solid ground of self-interest that the constitution has rested its provision for the social and commercial intercourse between the various parts of the country. But what is now insisted on is, that although a state must, by force of the laws regulating its own growth, give these means of intercourse both to her own citizens and to the citizens of the other states, still she cannot be compelled to do so on the ground of a duty of positive legal obligation.

The result therefore is, that the restriction, during the period specified, on the legislative power in this state, to authorize the construction of a railroad to compete in busi-

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ness with that of the defendants to the extent designated, is not open to the objection above considered.

But, in addition to the foregoing observations, if any further answer to this head of the argument were requisite, it would be sufficient to say that, conceding that the legal duty contended for exists on the part of a state, and that the ability to discharge such duty cannot be suspended by agreement, nevertheless the stipulation in the charter of the complainants, which is called in question, is not unconstitutional. To show the truth of this conclusion we have but to recollect that, in legal effect, the prerogative of the state to construct such railroads as she may deem necessary, is not, by force of her agreement with the joint companies, suspended for a single instant. The doctrine that the franchises of a private corporation can, like property belonging to natural persons, be taken for public uses upon compensation rendered, is now unquestioned law. The consequence, therefore, is, that when the state agreed not to permit any other railroad to be constructed within the time specified in the charter, in point of law such stipulation imported that such act should not be done, unless upon a reasonable indemnification. Consequently, as the state did not incapacitate herself from the discharge of the alleged duty, the argument must fail, if for no other reason, at least for want of premises to support it.

The foregoing were the principal grounds of objection against the validity of the rights claimed by the complainants, which were urged on the argument before this court by the counsel of the defendants, with so much ingenuity, learning, and ability. It is true, that there was one other topic which was somewhat pressed, but I do not deem it of sufficient weight to call for any extended discussion at my hands. This contention was to the effect that the legislature could not, legally, agree with the complainants not to permit, for a specified term, competition in their business, as such a compact was a derogation from the power of subsequent legislatures. This argument is not new; it has often been pressed

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upon the attention of the judicial tribunals, both state and national, but, it must be confessed, with indifferent success. The fact is, it would seem undeniable that the doctrine is an explicit denial of the right of a legislature to make a contract binding on future legislatures, for it is not easy to conceive any ordinary contract which will not, in some measure, restrict the freedom of action of those who are parties to it. Such a theory, therefore, is obviously inconsistent with that long line of adjudications which have their root in the case of *Dartmouth College v. Woodward*. But this objection needs no further notice, as it is most completely refuted in the learned opinion which was read in this case in the Court of Chancery.

It will be perceived that my general conclusion on this part of the case is, that the law which confers upon the complainants the exclusive right to carry passengers and goods between the cities of New York and Philadelphia, by means of a line of travel of which a railroad forms a part, is, in all respects, valid and constitutional.

The next inquiry, then, which in the natural order of the subject is presented, is, have the defendants infringed these rights of the complainants? The point rests upon matters of fact and the proofs in the case, a minute discussion of which would subserve no profitable purpose. I shall, therefore, merely state such circumstances as I deem to be established by the evidence, and which will serve in elucidation of the conclusions to which I have come.

The defendant, the Camden and Atlantic Railroad Company, was chartered on the seventeenth of March, 1852, and, in pursuance of the authority thereby given, laid their road from the city of Camden, through the counties of Camden and Atlantic, a distance of about sixty miles, to the ocean at Absecom inlet. The other defendant, the Raritan and Delaware Bay Railroad Company, by their charter, dated on the third of March, 1854, and by certain supplements thereto, was empowered to construct a railroad from some suitable point on Raritan bay, eastward of the village of Keyport, in

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the county of Monmouth, through the counties of Monmouth, Ocean, Atlantic and Cape May, to Cape Island, on the Atlantic ocean. The bearing of the route thus prescribed was, in its direct course, nearly parallel with the line of the sea coast, and, running on that course, would have intersected the Camden and Atlantic railroad at a distance of about forty miles from the city of Philadelphia. This company, after entering the county of Burlington, turned their road about ten miles from the direct route thus prescribed, so as to carry it to the village of Atsion, which is situated near the northwest corner of the county of Atlantic. The Camden and Atlantic Railroad Company, by its charter, was authorized to construct a branch or spur from their road to the village of Batsto, in the county of Burlington, and by an agreement entered into on the twenty-fifth of October, 1861, between that company and the Raritan and Delaware Bay Railroad Company, it was, amongst other things, stipulated that the latter company should construct this Batsto branch; and that it should furnish the means, control the construction, designate the point of its termination on their road, and determine the cost of the work. It was further agreed, that the Camden and Atlantic Railroad Company should transport, or permit the Raritan and Delaware Bay Railroad to transport, in connection with their road, all locomotives, passengers, and freight, between the said point of intersection and the termini of their road, and should procure ferry boats to be used at the termini of their road and branches on the Delaware, and should convey thereon all the freight, passengers, and cars aforesaid. There was also a provision that the number of trains, the time of running, and the rates of fare, should be regulated by the Raritan and Delaware Bay Railroad Company. By a supplemental agreement of the sixteenth of February, 1862, it was further provided, that in case the original agreement was not carried out in good faith, the Raritan and Delaware Bay Railroad Company should have the right to take possession of and manage the Camden

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and Atlantic road, so as effectually to carry out the purpose of said agreement.

The road of the Raritan and Delaware Bay Railroad Company was then completed to Atsion, and, in pursuance of the agreements above specified, the branch of the Camden and Atlantic railroad, called the Batsto branch, was made to this same village, and by this means a continuous line of railroad was perfected between the Raritan bay and the Delaware river at Camden. The road thus constructed went into operation in September, 1862, and in the month of November of the same year, boats were running regularly to the northern terminus of this route, and thus a complete line of communication was established between the cities of New York and Philadelphia. The carrying business between these cities was in the hands of transportation companies, and by an agreement, dated the twentieth of December, 1862, between one of these carriers and the Raritan and Delaware Bay Railroad Company, it was stipulated that the agreements above mentioned between the said railroad companies, should be deposited with a designated agent for the benefit of such carriers.

The result of this statement of facts, presents the case in this aspect: The Raritan and Delaware Bay Railroad Company was, by its charter, empowered to build a road in a line nearly direct from a designated point on Raritan bay to Cape Island, on the Atlantic ocean. The capacity is given to it to run locomotives and cars, to carry passengers and freights, to take tolls on such line. This is the entire scope of the legislative grant; the corporate body is vested with no legitimate powers beyond these. Now, in point of fact, what it has effected is this: it has established a continuous line of railroad from the waters of Raritan bay to the waters of the Delaware, opposite to the city of Philadelphia. This end has been reached by a deviation from its prescribed route, of about forty miles. Nor will the suggestion that this measure has been accomplished by means of the privileges conferred on the Camden and Atlantic company, remove

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the objection. That company could not transfer its capacities, or any of them, to another corporation. The right to build a branch to Batsto, the right to run cars on such branch and on its main road, and to carry passengers and goods, and receive a return in tolls, were franchises which could not be surrendered to another corporation. No legal proposition can be more undeniable than that corporations cannot amalgamate their powers for the accomplishment of an end which has not a legislative sanction. It would be superfluous to point to the authorities in support of so well settled a principle. In my opinion, it was just as illegal for the Raritan and Delaware Bay railroad to build a branch to the Camden and Atlantic road, and, by means of a compact, to obtain a right of way over the last named road to the city of Camden, as it would have been for the first named company to have constructed a road for itself from Atsion to Camden. The objection to each act is the same; in each case the corporation exercises an authority not conferred upon it by law. Nor do I think any example could more forcibly display the necessity for the restriction on the powers of corporations, which is above indicated, than this present case. For, if this company had asked from the legislature a charter to establish a railroad line so as to unite Raritan bay with the Delaware, in the vicinity of Philadelphia, no person at all acquainted with the history of the public improvements of the state, can doubt in the least that such application would have been summarily rejected. But, for the present purpose, it is sufficient to observe that the line in question has been set on foot in violation of law, and to the prejudice of the rights of the complainants. And I am also further satisfied that the two corporate defendants have united and co-operated in the establishment of this line with a view to the business between the cities of New York and Philadelphia. This purpose, I think, is to be seen in every feature of the case—in the pleadings—in the evasive and equivocal answers of the defendants—in the depositions—in the agreements—and in the sequence and coincidence of events. Indeed, it seems to me

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impossible that any candid person can look at the map of the state, with the route of this road and the deviations from such route marked upon it, and entertain any doubt upon the subject. The object conspicuously was, to compete in business with the complainants; the instrumentalities used were the covert deflection of the route of the one road to Atsion; the construction of the spur to the other road, under the pretence of building the Batsto branch; the agreements between the two confederate defendants, and the arrangements with the transportation companies. These are characters of the transaction which can bear but one meaning; and as the illegitimate scheme has been carried into effect, it is evident that the complainants have just ground of complaint, and are entitled to the protection of a court of equity.

But before proceeding to the consideration of the measure of relief which should be granted, it is proper that I should here remark, that my conclusion from the whole case would not have been different from what it now is, if I had been convinced that the complainants were not entitled to the exclusive franchise embraced in what is called the monopoly clause in their charter. With that clause altogether expunged, I should still hold that they would be entitled to relief in this suit against these defendants. In this respect, I put my opinion upon this ground. Waiving the express grant of exclusive privileges contained in their charter, it is obvious that the complainants would still be invested by legislative authority, with the franchise to make, possess, and use a railroad over this state between certain termini, and to establish a line of communication for the transmission of passengers and goods between the cities of New York and Philadelphia. Now it is admitted, that it has been definitely decided that such franchise does not divest the power of the legislature to grant to another company a similar privilege. Such was the result in the case of *The Charles River Bridge v. The Warren Bridge*, 11 Pet. 420. But it will be remembered that it was not until after an arduous struggle, marked by a memorable divergence of judicial

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opinion, in both the state and federal courts, that the doctrine was established, that the mere grant of a charter to a company would not, *per se*, prevent the state from investing another company with a privilege which would interfere, by way of competition, with the enterprise authorized by the prior grant. Judge Story dissented from this view of the law, and in an opinion characterized by strenuous argument and rich with learning, advocated the opposite side, contending that the gift of a franchise by the state necessarily imported that the state would not, by any subsequent concession, derogate from the value of its own prior grant. But the right of the state to repudiate, in these matters, all obligations, except such as are inherent in express contract, was settled by the predominance of one vote in the judicial consultation. Such, undoubtedly, is the rule of law, but it is not in this light that the present case is presented. The defendants are not here claiming a statutable right to set up a line of railroad to compete with the chartered rights of the complainants. On the contrary, there is no pretence that the state has yielded her assent to any such competing enterprise. A railroad for popular use is *publici juris*; it cannot be legally erected without a legislative permission; and the consequence is, that the road established by the defendants, in excess of their legitimate powers, is a public nuisance, and an usurpation of the rights of sovereignty vested in the body politic.

The controversy in this case, therefore, is between the complainants and mere wrong-doers, and the question thence arises, has a railroad company any redress against a competition unwarranted by law, and which materially affects the value of the privileges with which it is legally vested? I am at a loss to perceive upon what premises, or by what course of reasoning, other than an affirmative answer to this question could be justified. A franchise to build a railroad for public use and to take tolls, is property, the title to which is held for the sovereign; and, like every other thing susceptible of private ownership, it must, of necessity, be under

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the protection of the laws. Unless it can be shown that this species of right is altogether anomalous in its character, and is under the control of exceptional rules, a wrongful invasion of such right cannot but be followed by a legal vindication. Theoretically, then, the claim to judicial redress is clear, and all legal analogies, as well as decided cases, concur in support of the same view. At common law, franchises of a similar nature, considered with regard to remedial justice, were placed on the footing of other proprietary things. "If a ferry," says Blackstone, "is erected on a river, so near to another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one." 3 *Black. Com.* 219. And to the same effect is the case of *Blisset v. Hart, Willes' R.* 508; the court, speaking of a ferry, say: "It is a franchise that no one can erect without a license from the crown; and when one is erected, another cannot be erected without an *ad quod damnum*. If a second is erected without a license, the crown has a remedy by a *quo warranto*, and the former grantee has a remedy by action." The books are replete with cases sustaining actions for encroachments upon the exclusive enjoyment of privileges of this class. The rule of the common law is clearly indisputable. The franchises to maintain markets and toll bridges belong to the same category, and were under the same protection. And these principles of the common law have been applied in their full vigor to this same class of franchises, when created by statute. In the case of *The Newburgh Turnpike Co. v. Miller*, 5 *Johns. C. R.* 101, a competing free road had been erected, without authority of law, in the vicinity of a turnpike, and Chancellor Kent enjoined the former from the continuance of the interference, declaring that the rules of the common law relating to ferries, fairs, markets, and toll bridges, were applicable to any of these similar privileges created by statute. And in the case of *The Croton Turnpike Co. v. Ryder*, 1 *Johns. C. R.* 611, the same principle was recognized and made the ground of the decision. I am aware that in the case of *The Auburn and Cato Plank Road Co. v. Douglass*,

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5 *Seld.* 444, both these adjudications are treated as overruled; but without expressing any opinion as to the correctness of such result, it is sufficient to say that the later decision is not based on any ground which can detract anything from the value of the prior adjudications as precedents of weight upon the point now under consideration. The overruling case, indeed, expressly admits the principle now insisted on. It seems to me, it must be admitted that the rule of law, apposite to the matter now in hand, is entirely settled. When, therefore, the complainants obtained from the state the right to establish their road, I think that, by the intrinsic force of such grant, such franchise was exclusive against all persons but the state. A competing road, set up without a legislative license, is a fraud upon such grant, and is a plain public nuisance. The consequence is, that the case of the complainants, in my opinion, does not, necessarily, rest upon the express clause in their charter guaranteeing to them an exclusive privilege. After the first of January, 1869, when the effect of that clause will be spent, the defendants, as at present constituted, will have no greater right than they now have, to establish a line of railroad to compete in business with the complainants between the cities of New York and Philadelphia.

The only point remaining to be disposed of, is the question as to the extent of relief to which the complainants are entitled.

The rule of equity is, that the complainants are entitled to complete relief; and they claim that the only course which will fully protect them will be the actual abatement of that portion of the roads of the corporate defendants which has been constructed for the purpose of violating their rights. This part of the case has given me some perplexity, and I am not yet entirely certain that the relief thus specified is not the proper measure. It is clear, that as long as this illegal structure remains, some loss must fall upon the complainants, for, beyond any question, in spite of every effort which can be made, some passengers will be carried by this

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line of the defendants between the two cities. Its existence, too, is a standing menace to the rights of the complainants. It imposes upon them the trouble of vigilance. It is likewise evident, that very serious questions, involving the essential rights of the complainants, may arise from this same source. Indeed, on the argument of this case, one of the counsel of the defendants contended that the road of the defendants, being an existing highway through the state, the inhabitants of other states could not be prevented from its use. If this position were deemed tenable, the course of the court would be clear, for in such a position of affairs the abatement of the road would alone afford the protection due to the justice of the case. But I do not concur in the opinion thus expressed, for in my estimation the citizens of other states cannot claim the right to use the highways of this state in a mode prohibited to our own citizens. Citizens of other states are entitled to all the privileges that are not strictly local, which belong to the citizens of this state, but they cannot assert, by way of prerogative, a right to violate with impunity the laws of this state. However, the suggestion of such a doctrine should put the court upon its guard, and should induce it to leave nothing undone which is necessary to ensure the complainants against every reasonable apprehension of harm.

After full reflection, I have concluded that, at present, it is not indispensable to the ends of equity in this case, to abate any part of this road of the defendants. If the defendants should, however, hereafter claim any right hostile to the complainants, from the mere fact of the existence of this illegal structure as one of the highways of the state, its actual abatement would then become, in the course of justice, an absolute necessity. But, under existing circumstances, so decided a course would seem to be uselessly severe. The disruption of any portion of this road, so as to disturb its use for local purposes, would evidently occasion great loss and inconvenience to persons living in its vicinity. This suit has now been long pending; the complainants have suffered this

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appeal to lie idly in this court for some years, and in the interim property along the line of this highway has accommodated itself to the present condition of affairs. In giving adequate relief to the complainants, it is highly desirable to avoid doing all needless detriment to the public.

I have already said that, in my opinion, this road which the defendants have set up, when used as a link in the line between the cities of New York and Philadelphia, is a nuisance, and an infringement of the legal rights of the complainants, and will remain such after the first of January, 1869, and until the defendants shall have acquired a grant of power in ratification of their enterprise from the state. By the decree of the Chancellor, the use of this road, as a competing line between the two cities, has been enjoined. That decree appears to have been based upon the monopoly clause in the charter of the complainants, and it is obvious, therefore, that a doubt may arise whether such injunction may not lose its efficacy after the first of January, 1869. It seems to me this point should not be left in uncertainty. The complainants are entitled to have their rights, which are involved in this controversy, clearly and definitively settled by the decree in this cause. For the purpose, therefore, of removing all obscurity as to the extent of the relief afforded, the decree of the Court of Chancery should be modified, and the two corporate defendants should be enjoined from ever hereafter using, by force of their present charters, that section of road lying between the village of Jackson and the point near Hampton, in the county of Burlington, where the Raritan and Delaware Bay Railroad Company begins to deviate from the direct route to May's Landing, or any part of the same, as a link in the line of communication between the cities of New York and Philadelphia. And as a measure precautionary against any possible injury to the complainants, which may arise from the existence of the road of the defendants as a *de facto* highway across the state, a privilege should be reserved to the complainants, in case the defendants should set up hereafter any adverse claim by reason

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thereof, to come in and have, as an established right, an immediate abatement of so much of that portion of the road above designated as will effectually sever the connection between the two roads of the corporate defendants. The residue of the decree of the Chancellor should remain unaltered, the defendants paying the costs of both appeals.

DALRIMPLE, J. I concur in the result to which the Chief Justice has come, in the opinion just read, save in respect to the relief to which the complainants shall be entitled in case of violation by the corporate defendants, or either of them, of the injunction granted.

In my opinion, the complainants, in case of violation of the decree of this court, should be left free to apply for, and the Court of Chancery to grant, such relief as may be equitable and just, after consideration of all the circumstances of the case, and after hearing all parties who may be entitled to be heard.

The decree of the Chancellor was modified in the particulars stated in the opinion of the court, and in all other respects affirmed.

LERCH and others, appellants, and OBERLY and others, respondents.*

When, by an order of the Orphans Court, under the statute, more land is ordered to be sold than is necessary to pay the debts of an intestate, the proceeds of such sale, to the extent of such excess, are not, in legal contemplation, converted into personalty, but will go to the heir-at-law, and if he die under age, will descend to his heirs the same as the land if unsold would have done.

Owen Oberly, of Warren county, died on the first day of September, 1852, intestate, seized of a valuable farm in that county, leaving a widow, the defendant, Anna Maria Lerch, who afterwards was married to the defendant, Benjamin F.

* CITED in *Wurts' Ex'rs v. Page*, 4 C. E. Gr. 375; *Cook's Ex'r v. Cook's Adm'r*, 5 C. E. Gr. 377; *Fidler v. Higgins*, 6 C. E. Gr. 145; *Schenck v. Vail*, 9 C. E. Gr. 551.

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Lerch, and one child, Emma Oberly, an infant three weeks old. His personal estate was not sufficient to pay his debts. Administration of his estate had been granted to his widow, and upon application by her and the defendant, Benjamin F. Lerch, who, after the intermarriage, had been joined with her in the administration, the Orphans Court of Warren county, in April, 1853, made an order for the sale of the farm to pay debts of the intestate, to the amount of \$3818.87. On the fourth of September, in that year, the farm was sold for \$12,876.49, including the widow's right of dower. Of this sum one-third was invested on mortgage for the life of the defendant, Anna Maria; and of the residue there remained, on the settlement of the final account on the sixth of April, 1859, \$5794.41, above debts and expenses. This balance was paid unto Charles Oberly, one of the complainants, who had been duly appointed guardian of the infant, Emma Oberly.

In 1861, Charles Oberly, as such guardian, received \$389.59, the infant's share of that part of the proceeds of the lands of her paternal grandfather, John Oberly, situate in the county of Warren, sold in 1834, by a partition sale, which had been invested for the dower of her grandmother, Catharine Oberly, who died in 1860; and also \$1694.47, her share of proceeds of lands of the same grandfather, situate in Pennsylvania, sold about the same time on like proceedings, and which had been invested for the same purpose.

The infant, Emma Oberly, died on the second of April, 1865, aged twelve years, leaving the complainants, Charles Oberly, John F. Oberly, and Robert Oberly, her paternal uncles, and the complainant, Emma Baker, the daughter of her deceased paternal aunt, her only heirs-at-law, besides her mother, who inherited for her life; and leaving her mother and three infant children of her mother by the second marriage, her next of kin.

In 1865, after the death of Emma, the complainant, Charles Oberly, as her guardian, settled his account in the Orphans

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Court of Warren county, upon which the balance was \$9464.74.

In September, 1865, administration of the estate of Emma Oberly, was committed by the surrogate of Warren county to the defendants, Benjamin F. Lerch, Anna Maria Lerch, and Jehiel T. Kern, who thereupon sued the complainant, Charles Oberly, the late guardian, in the Supreme Court of this state, for the whole balance in his hands.

The bill in this cause was filed to enjoin that suit. The cause was argued in the Court of Chancery, upon a motion to dissolve the injunction. The motion was denied. The opinion of the Chancellor is reported *ante* p. 346.

Mr. Shipman and *Mr. Vanatta*, for appellants.

Mr. E. T. Green and *Mr. J. Wilson*, for respondents.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

The question of law which has been argued in this case before this court, relates to the legal destination of the surplus proceeds of lands sold for the payment of the debts of a decedent, under the order of the Orphans Court of the county of Warren. The fund in question is a surplus remaining after the settlement of the administration, and the dispute is, whether such surplus is to be considered, with regard to the parties now before the court, as real or personal estate. The intestate left surviving him one child, who died subsequently to the sale and during her minority, and the contestants for the fund are the heirs-at-law and the personal representatives of such infant.

On the part of the heirs-at-law, who are the respondents in this court, it is insisted that the rules of equitable conversion apply to the facts of the case, and that the object of the sale of the real estate of the intestate being simply to pay the debts of the estate, the land cannot be considered converted into money in judicial consideration, except to the

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extent necessary to effectuate such purpose. As a consequence of this theory, it is further contended that as this money came to the heir of the intestate impressed with the character of realty, such heir, being an infant, could not remove such character, and that, therefore, its devolution must now be regulated by the law of inheritance, and not by the rules of distribution.

There can be no doubt, either as to the existence or fixed character of the doctrine of equity to which reference is thus made. The principle is established by a multitude of cases, that where real estate is directed, either by the owner or by the order of the law, to be converted into money for a particular object, and a surplus remains after the accomplishment of such object, such surplus, as between the heir and personal representative of such owner, will be regarded by a court of equity as land, and will descend as such. The authorities on this subject will be found fully collected in connection with the conspicuous cases of *Fletcher v. Ashburner*, and *Ackroyd v. Smithson*, in 1 *Lead. Cas. in Eq.* 775 and 809. And this *transubstantiated real quality*, as Lord Hardwicke terms it, (3 *Atk.* 446,) with which, in the estimation of equity, such surpluses have been impressed, remains until their absolute owner, being *sui juris*, has manifested an intention to divest them of such character, and to treat them as personalty. And, accordingly, by force of these principles, which are not to be disputed, it is now urged that as the purpose of the order of the Orphans Court, in the present case, was to effect a payment of the debts of the estate, the sale of the lands in excess of such purpose, will not, in point of equity, accomplish a conversion, and that the surplus money now in controversy retains its notional impress of realty, and must descend as such to the heir at-law. The reply of the counsel of the appellants to this insistence was, that the order of the Orphans Court was not simply an order for a sale of the land to pay the debts of the estate, but that it embraced another purpose, which was the benefit of the heir of the decedent; and that, consequently,

a conversion out and out has occurred, the result being, that the money came to the heir as personalty, and must be distributed as such. But is this assumption founded in the facts of the case? The statute by force of which the sale in question was made, after empowering the Orphans Court, in case of a failure of the personalty, to order a sufficiency of the real estate to be sold, contains this provision; "That, where any houses and lots, or lands, are so circumstanced that a part thereof cannot be sold without manifest prejudice to the heirs or devisees, the said court may, at their discretion, order the whole, or a greater part than is necessary to pay such debt, to be sold; and the surplus money arising from such sale shall be distributed among the heirs or devisees, according to the law of descents in the former, and the will of the testator in the latter case." In the instance now before us, the Orphans Court directed the entire property to be sold, on the ground that the sale of a part would be a manifest prejudice to the heirs. Now, I think it is clear that the entire purpose of this sale was to obtain a fund with which to pay the debts of the decedent. Such sale was a necessity, and would have been ordered, no matter how disastrous it might have been thought to the interest of the infant. The provision of the act authorizing a sale, under the circumstances specified, of more land than might be necessary to produce the requisite amount, is merely a legislative direction to do as little injury as possible to the heir-at-law or devisee. I see nothing in this course of proceeding which seems to indicate any intention to alter the nature of the property with regard to its heritable capacities. It does not appear to me to differ from a general direction to sell lands for a special purpose, in which case it is clear that by the rules of law already adverted to, such direction and sale will operate to convert the fund so far only as it disposes of it. The statutory procedure falls short of effecting a conversion out and out; the conversion, as it seems to me, being for a limited purpose only, the surplus fund in question came to the heir-at-law of the decedent as realty for all the purposes of succession.

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The cases upon this subject are somewhat conflicting, but I think the above conclusion is sustained by a preponderance of authority. *Cooke v. Dealey*, 22 *Beav.* 196; *Banks v. Scott*, 5 *Madd.* 493; *Wright v. Rose*, 2 *S. & S.* 323; *Bourne v. Bourne*, 2 *Hare* 35; *Jermy v. Preston*, 13 *Sim.* 356; *Sweezy v. Thayer*, 1 *Duer* 286; *Merick v. Bavier*, 6 *Ired. Eq. R.* 524; *Lloyd v. Hart*, 2 *Barr* 473.

But had I arrived at a different result, I should not have felt at liberty to decide this case on the general doctrine, for to my mind it is clear that our decision must rest upon the same foundation as the case of *Snowhill v. Snowhill*, 2 *Green's C. R.* 20. In that case, the lands of an infant had been sold by virtue of a special act of the legislature, which had been enacted on representations that such sale would be for the benefit of the infant. The sale having taken place, the infant heir being still in his minority died intestate, and the question arose whether the fund, the produce of the sale of the land, passed to the heirs or to the next of kin of the infant. The Chancellor regarded the fund as personalty, but his decision was reversed in the Court of Errors.* This case in my opinion, is not to be distinguished in the least degree, from the present case; and it has been the unquestioned law of this state for over thirty years. It is a decision of the highest court in the state, and I do not think we are free to say that it has not, in practice, been followed. The law is uncertain, indeed, if the final conclusions of this court, after so long a lapse of time, are not to be considered as unalterable, so far as judicial action is concerned. Nor am I able to perceive any reason which should incline this court to a reversal of this decision. Such a result would, clearly, be not consistent with the policy on this subject, as exhibited in the legislation of the state. If we refer to our laws authorizing the sale of the lands of infants, or those of lunatics, we find the rights of the heir-at-law carefully guarded; the statutory provisions being, that the proceeds of such sales "shall be considered relative to the statutes of descents and distribution and for every other purpose, as real estate of the same nature as the

* The decision of this court is not reported. See 1 *Green's C. R.* 30.

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property sold." With this system, it is plain the decision referred to is in perfect harmony. Indeed, it would be an obvious incongruity if the proceeds of the sale of lands of an infant, sold by an order in the course of administration of an estate, should, on the death of the infant, go to the next of kin, while the proceeds of a sale made on a direct application for the benefit of the infant, should pass to the heir-at-law. By adhering to the decision of the Court of Errors, in the case under consideration, we avoid any such inconsistency. Nor should we forget, that by the operations of established rules, our courts of equity produce a similar result, for in these tribunals it is a fixed principle never to permit the property of an infant to be changed from personal to real, or from real to personal, so as to affect the succession to it. 2 *Atk.* 413; 1 *P. Wm.* 389. Such course is also eligible in respect to the circumstance that it removes all temptation from the relatives of infants to endeavor, after a conversion of lands into money, to divert them from the line of descent.

In my opinion, this point, which is the only substantial one in the case, should be considered as *res adjudicata*.

The decree of the Chancellor was also objected to because costs were awarded against the defendants in the court below. But I find no error in this. It is true that such defendants were before the court in a representative character, but it is obvious that, in this controversy, they stand in the place of the next of kin, who are the contestants for the fund in question, against the heirs-at-law. Under such circumstances they should not be permitted to carry on this litigation except at the risk of costs. Administrators are not compellable, unless indemnified, to prosecute doubtful claims for the benefit of the next of kin.

These were the only points raised on the argument.

I think the decree should be affirmed, with costs.

It is proper to say that no question was made with regard to the standing, in this court, of the appellant in this case. The appeal was from a refusal of the Chancellor to dismiss a

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temporary injunction, restraining a suit at law for the purpose of the proceeding in chancery. Such refusal was with costs against the party making the motion. Whether such an order is a proper subject of appeal has not been mooted, and is not decided.

The decree of the Chancellor was affirmed by the following vote :

For affirmance—BEASLEY, C. J., ELMER, FORT, KENNEDY, OGDEN, VAIL, WALES. 7.

For reversal—BEDLE, DALRIMPLE, VREDENBURGH, WOODHULL. 4.

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ACCEPTANCE.

See CONTRACT, 12, 13, 14, 16.

ACCOUNT.

See ACTION, 2.

JURISDICTION, 1.

PRACTICE, 16, 19, 20, 22.

ACQUIESCENCE.

See CHARTER, 16.

SHORE OWNER, 3.

ACTION.

1. A suit on a written contract, for the contract price for work and labor done, if the work has been performed according to contract, or if it has not been so performed, and the party for whom it is done has dispensed with the contract in some particulars, or has accepted and used it, and the same is a substantial advantage to him, must be brought at law. *Torrey v. C. & A. R. Co.*, 293

2. The statute of limitations is a bar in equity, to an account between partners. *Cowart v. Perrine*, 454

3. A submission to arbitrators, of partnership affairs, without limit as to time, cannot keep any claim that might have been included in the submission, alive for the purpose of a suit indefinitely. *Ib.*

See JURISDICTION, 2.

NOTES, 2, 3.

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ADMINISTRATION.

1. The grant of administration constitutes the person to whom it is granted, the administrator, whether rightfully or wrongly granted, and cannot be inquired into in this court, collaterally. *Quidort's Adm'r v. Pergeaux*, 472

2. The acts of the surrogate can only be reviewed by appeal to the Orphans Court or Prerogative Court. They cannot be impeached collaterally. The only question that can be made is, whether he had jurisdiction. *Ib.*

3. If the supposed intestate is not dead, or if letters lawfully granted to some one else are in existence, the grant is void. *Ib.*

ADULTERY.

See DIVORCE, 1, 2, 3, 8, 9, 10.

AGENT.

See CONTRACT, 22.

PRINCIPAL AND AGENT.

USURY, 1.

AGREEMENT.

See CONTRACT.

ALIMONY.

1. In a suit against a husband for alimony under the tenth section of the divorce act, it is proper to allow to the wife counsel fees, and

also temporary alimony, *pendente lite*. *Vreeland v. Vreeland*, 43

2. Counsel fees and alimony, *pendente lite*, are only allowed to a wife; and where the answer denies the fact of marriage under oath, and the fact of marriage is the main controversy in the cause, they will not be allowed, except upon satisfactory proof of the fact of marriage, or that the defendant cohabited with the complainant as his wife, or publicly acknowledged her as such. *Ib*

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ALTERATION.

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ANSWER.

See PLEADING, 1, 4, 6, 7.

ANTENUPTIAL SETTLEMENT.

See MARRIAGE SETTLEMENT, 2, 3.

APPEAL.

See ADMINISTRATION, 2.
JURISDICTION, 8.
PRACTICE, 6.

APPRENTICE.

1. An indenture of apprenticeship, with covenants valid in the state where executed, will be enforced in the courts of this state, if not *contra bonos mores*, or against the policy of our law. The personal status of each individual is governed by the law of actual domicile. *Petrie v. Voorhees' Executor*, 285
2. In general, executors are bound by all covenants of the testator, except such as must be performed by him in person. *Ib*.

3. In a contract of apprenticeship, the covenant to support must be limited to the time of service, and cease when that ends. But the principle must be settled at law, and unless the right is so settled, the aid of this court cannot be extended to prevent the distribution of the master's estate to protect a doubtful claim. *Ib*.

4. A provision made by a master in his will, for the support of his apprentice, if liberal, according to his circumstances and her condition, must be taken to be a satisfaction of his obligation to support her. *Ib*

ARBITRATION.

See ACTION, 3.

ASSIGNEE AND ASSIGNMENT.

See MORTGAGE, 1, 6, 14, 15.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Where a resident of another state, by a preferential assignment valid there, conveys all his property to assignees, for the benefit of his creditors, and includes in it lands in this state, the assignment is void as to the lands in this state, and a purchaser from the assignee acquires no title. *Bentley v. Whittemore*, 366

ATTACHMENT.

1. Proceedings by foreign attachment are not void, merely because the defendant was a resident of the state at the issuing of the attachment. The foundation of the proceedings, and of the jurisdiction of the court, is not the non-residence of the defendant, but the affidavit of the plaintiff's belief of his non-residence. *Weber v. Weitling*, 441

2. When such affidavit is regular, and made in good faith, this court cannot collaterally inquire into the fact of non-residence, and declare the proceedings void. *Ib.*

3. The estate of a lunatic may be proceeded against by attachment, and he need not appear and be defended by his next friend. *Ib.*

BANKING.

Where "seven (or more) citizens of this state" associated to establish an office of discount, deposit, and circulation, under the act to authorize the business of banking, approved February 27th, 1850, and executed, acknowledged, and had recorded in the offices of the secretary of state, and the clerk of the county where said office was proposed to be located, the certificate required by the sixteenth section of the act, which certificate also states that the associates had elected one of their number to be president of the association, and the association went into operation without further organization, except the selection of a cashier, it was *held*—

1. That the persons signing said certificates were only associates, and corporators or stockholders, and not directors or managers of said corporation; the eighteenth section giving to them only power "to choose a board of directors," under whose "direction" the business of banking may be conducted.

2. That the transaction of banking business by said associates, or by the president alone, whom they had selected, was a fraud on the statute.

3. Where seven of the associates subscribed for only five shares each, and the balance of the three thousand shares was subscribed for by the eighth associate, who was also the president elect, and one-third on each share of the whole stock was paid in by the president, the other associates paying nothing,

it was held to be a valid corporation, and each and all the associates responsible for its proceedings.

4. That each of said associates was liable, in case of insolvency, to pay the deficiency on the stock standing in his name, not exceeding the amount of each share as fixed by the charter, or such proportion as shall be required to satisfy the debts of the company, and that a court of equity will enforce such payment.

5. Under the second section of the act to prevent frauds by incorporated companies, approved April 15th, 1846, it was held, in order to evade a sale or transfer by an insolvent corporation or its officers, it must appear that the corporation had, previously to such sale or transfer, become insolvent, or suspended its ordinary business for want of funds.

6. Under the proviso to said section, a transfer of notes or property of the bank, prior to suspension, for a valuable consideration, to a *bona fide* purchaser, without "knowledge, information, or notice of the insolvency," was held to be good and valid.

7. The "knowledge, information, and notice of the insolvency" cannot depend on mere constructive notice, or what will put the party on inquiry only. The terms of the act imply knowledge, either of the party himself, or imparted to him by some one who had that knowledge, and not mere suspicion, supposition, or belief of himself or of another, imparted to him.

8. An associate who took no part in the transactions of the bank after he had signed the certificate, was not in a situation to be charged with implied knowledge or notice as a director or manager.

9. Where a sum of money was placed in the bank as a special deposit to meet a contingency of the bank which never happened, the repayment of the same by the receiver was held valid.

10. The removal of the receiver was refused.

11. Several payments were made by the bank, but whether before or after suspension, did not clearly appear; in these cases the receiver was directed to deal with them in accordance with the principles stated in the opinion. *Kinsela's Administrator v. The Cataract City Bank*, 158

BONA FIDE PURCHASER.

See BANKING, 6.
MORTGAGE, 10.

1. The title to the public bridges constructed by a county, is vested in the board of chosen freeholders of that county. It is a corporation created for the purpose of representing the county and holding its property, and suits for the protection of such property are properly brought in the name of that corporation. *Freeholders v. Red Bank Turnpike Co.*, 91

2. The bridges belonging to a county are public property, held for public use, and are not within the protection of the constitutional provision which forbids private property to be taken for public use without compensation. The legislature have power to direct in what manner such bridges shall be appropriated to public use; and may authorize them to be taken by a turnpike company for part of its road, without compensation. *Ib.*

3. Where the charter of a turnpike company authorizes it to construct a road on a route which includes a public county bridge, and requires it to pay to the owners of lands over which the road should pass, all damages sustained, the compensation clause applies to such bridge, which is included in the term *land*, and of which the county is the owner. *Ib.*

4. Even if the damages by taking the county bridge would be only nomi-

nal, the county is entitled to restrain the turnpike company from using it as a part of their road, until the damages are assessed and the title of the bridge vested in the company, so that the county may be relieved from the obligation to repair it. *Ib.*

BURTHEN OF PROOF.

See DIVORCE, 7.
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CANCELLATION.

See MORTGAGE, 9, 10.
NOTES, 1.

CESTUI QUE TRUST.

See RESULTING TRUST.
TRUSTEE, 1.

CHARTER.

1. Under the act to incorporate "the Keyport Dock Company," (*Pamph. L. 1851, p. 25*), "the dock or wharf now owned by the said company" must be construed to mean now owned by the individuals composing said company. *Keyport Steamboat Co. v. Farmers Transportation Co.*, 13

2. By that act, an adjoining shore owner is not deprived of the privilege, obtained by charter or license, of wharfing out in front of his own lands, even if it prevents vessels from landing at the side of the complainants' wharf. *Ib.*

3. The exclusive right of the shore owner, as supposed to exist before the wharf act of 1851, and as confirmed or conferred by that act, is to the shore and lands under water *in front* of him, giving the same right to the adjoining shore owner, and *ex necessitate* excluding him from acquiring any right taking away the right of the adjoining shore owner. *Ib.*

4. The act to incorporate the Keyport Dock Company cannot be construed, by mere implication, to take away the rights of the adjoining shore owner to the water in front of him; and the power to enlarge and extend the wharf, though given by express words, must be construed so as to authorize such extension in front of lands of the company only. *Ib.*
5. An act incorporating a company for the purpose of constructing a railroad from L. to M., with no further grant of franchises, would not confer the power of taking lands by the right of eminent domain, or even grant the lands owned by the state that might be crossed by the route. *Ib.*
6. The question whether in New Jersey the legislature has power to grant to a stranger the right to cut off a shore owner from access, and other advantages of adjacency to the water directly in front of his shore along tide waters, is an open one, so far as any question is to be considered open upon which there is no direct judicial decision. *Ib.*
7. It would seem that in the decisions of *Gough v. Bell*, the Supreme Court and the Court of Errors were of opinion that the shore owner has vested rights in the waters in front of him that cannot be taken away by the state. *Ib.*
8. The only just rule of construction of a law, especially among a free people, is the meaning of the law as expressed to those to whom it is prescribed, and who are to be governed by it. *Ib.*
9. If the legislator who enacted the law should afterwards be the judge who expounds it, his own intention which he had not skill to express, ought not to govern. But circumstances known to all the public, such as what the law was at the time, or what it was supposed to be, are proper to be considered in looking for the intention of the legislature when not explicitly expressed. *Ib.*
10. Under the act of March 13th, 1866, (*Pamph. L. 345*), and the deeds by which they claim title, the Farmers Transportation Company of Keyport have the right to erect a wharf as proposed by them, so as that it does not obstruct the navigation of the bay, or affect the rights of the Keyport and Middletown Point Steamboat Company, or other private rights. *Ib.*
11. A legislative charter is a contract between the state and the corporators, which the state cannot impair. *Zabriskie v. Hackensack and N. Y. R. Co.*, 178
12. Corporators or partners, associated for a special purpose specified in their charter or articles of partnership, cannot change that purpose without the consent of all the corporators or partners. *Ib.*
13. The reservation in a charter, that the state may, at any time, alter, amend, or repeal it, is a reservation made by the state for its own benefit, and is not intended to affect or change the rights of corporators as between each other. Nor does it authorize the state to authorize one part of the stockholders, for their own benefit, at their mere option, to change their contract with the other part. *Ib.*
14. The power to alter or modify a charter is restrained to the powers and franchises granted by the charter. It does not authorize the legislature to change the object of the incorporation, or to substitute another for it. An alteration or modification is necessarily of the grant or thing to be altered or modified, and cannot be done by substituting a different thing; that would be a change. *Ib.*
15. A grant of an additional franchise to a corporation, not affecting or impairing those before granted, does not alter or modify the charter, if it does not compel the corporation to exercise such franchise. Such grant can be made, whether the right to alter and modify be reserved or not. But in neither case can the corpora-

tion be compelled to accept them, nor can part of the corporation accept them, without the consent of all. *Ib.*

16. Corporators, who stand by and suffer the company to construct a new work authorized by law, without interference, will be held to have acquiesced in it, and by such acquiescence, will lose their remedy in equity. *Ib.*

See MUNICIPAL CORPORATION, 11.
RAILROAD CHARTER.

CHOSEN FREEHOLDER.

See BRIDGE, 1.

CONSTRUCTION.

See CHARTER, 8, 9.
LEGACY.
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CONTRACT.

1. A contract to convey lands bounded on the south by a line ten yards north of the quarries on them, the face of the quarries, as worked, being toward the south, must be held to mean lands bounded on the south by a line ten yards north of the face of the quarries, as worked, without regard to the extent toward the north, of the stone that constitutes the quarries. *Huffman v. Hummer*, 83
2. When a line by which land is to be conveyed, is described as a line ten yards north of the face of quarries upon the tract, and that face is jagged, and at one extremity much to the north of the general line of the face, the line must be a straight line in every part, distant, at least, ten yards from the face of the quarry. *Ib.*
3. Although a written contract cannot, either at law or in equity, be waived or discharged by parol, yet, when one party, by a parol waiver or discharge, induces the

other to enter into engagements inconsistent with its performance, the remedy by specific performance will be barred; but for that purpose the waiver must be explicit, and clearly proven. *Ib.*

4. When the defendant bound himself to convey on or before a certain day, and the complainant agreed to pay, on the deed being executed, the complainant is not in laches in not tendering himself ready to pay, if the deed had not been executed or tendered. *Ib.*

5. A complainant asking specific performance, must have shown himself ready and eager to perform his part, and must be guilty of no laches in bringing suit; but a delay of six days in demanding a deed, or of fifteen days in bringing suit, will not be esteemed laches. *Ib.*

6. A one sided or unilateral contract, by which one party binds himself to convey lands, and the other party is not bound to purchase, is not favored in equity, and will not be enforced, if without consideration. But if it is part of a lease, or made at the same time with it, and in consideration of the lease, it will be enforced. *Hawralty v. Warren*, 124

7. A mistake as to the legal effect of an agreement, will not avail the defendant, unless led into it by fraud, or the representations of the complainant. *Ib.*

8. A stipulation that the complainant shall have the privilege of purchasing at a certain price is, in equity, tantamount to an agreement to convey at that price. *Ib.*

9. When the wife of the defendant refuses to join in the conveyance, and such refusal does not appear to be by collusion between her and the defendant, if the complainant is not willing to accept the title without her joining, the court will not compel the defendant to indemnify the complainant, and specific performance will not be decreed. *Ib.*

10. Where a sale of stock of a corporation was made in consideration, in part, of a promise that the corporation would not set up any claim against the vendor of such stock, on account of past transactions, and in violation of such stipulation, the company brought a suit, it was held that such stipulation was not a condition on which the title of the stock depended, and that, consequently, the title to such stock did not revert in the vendor. *Jackson v. Grant*, 145
11. The principal stockholders of a solvent company having agreed, for a consideration, that they would not claim anything on certain old accounts against a former officer of the company, it was intimated that a suit, making such claim in the name of the company, might, in equity, be considered a breach of such agreement, so far as the avails of such suit would go to the benefit of such stockholders. *Ib.*
12. An offer or proposal by one party to sell to another, unsupported by any consideration, may be withdrawn at any time before acceptance. *Houghwout v. Boisauvin*, 315
13. When accepted, it becomes a contract which may be enforced in equity. *Ib.*
14. Where one has "until" a certain day to accept, the acceptance may be made on that day, if the offer be still open. *Ib.*
15. If the proposal be clear and definite, and one to which a simple assent is a complete answer, such assent may be given either by writing, by acts, or by words. The statute of frauds requires the writing to be signed only by the person to be charged. *Ib.*
16. When the offer has been turned, by acceptance, into a contract, each party will have a reasonable time in which to perform it. *Ib.*
17. What delay will become such laches as to forfeit the right to enforce specific performance, must depend on the circumstances of each case. While equity requires the party who would enforce specific performance to be vigilant and prompt, it does not discourage purposes of settlement, or reasonable delays for that purpose. *Ib.*
18. A vessel was bought at sheriff's sale, under an agreement by the purchaser with the defendant in execution, that the defendant could redeem, at a certain day, by paying a greater sum, and that for part of that time, the vessel was to be in the joint possession and control of both parties—*Held*, that after the time for joint possession had expired, the defendant in execution had no right to meddle with, or take possession of, the vessel until he had redeemed it; and that taking it out of possession of the purchaser was a trespass. *Halsted v. Tyng*, 375
19. The time fixed in an agreement between a purchaser at sheriff's sale and the owner of the property sold, made upon the sale, for a conveyance of the property back upon the payment of a fixed price, will be made of the essence of the contract, by a provision that failure to pay at the time shall end the right. *Ib.*
20. If a purchaser at sheriff's sale agree to re-convey the property, upon being repaid the purchase money and other advances to be made by him, the amount of which is unknown to the party to whom the re-conveyance is to be made, and upon demand at the time fixed for re-conveyance, fails to render a proper statement of such advances, the time for re-conveyance will be extended, although made expressly part of the essence of the contract. The party to make payment is not in fault until a proper account is rendered, if demanded. *Ib.*
21. In a contract to convey land, it is necessary that the lands to be conveyed should be described or

designated in the written agreement. *Force v. Dutcher*, 401

22. An agent to sell lands, has not, merely as such, power to convey. He can bind his principal to convey, but cannot himself convey, unless authorized by a power of attorney, first duly acknowledged and recorded. Therefore a deed cannot be demanded of, or payment tendered to, a mere agent to sell. *Ib.*

23. A demand of a deed, and tender of payment, must be within a reasonable time. In this case, two years held not to be a reasonable time. *Ib.*

24. Part performance, to take a case out of the statute of frauds, must be clearly proved. *Ib.*

25. It is not necessary to set up in the pleadings, as a defence, the statute of frauds, unless the contract against which it is set up, is that on which the relief prayed for is founded. *Ib.*

26. A person making a contract to convey lands, verbal or written, and failing to perform it, is bound to refund the amount he may have received upon it, with interest. *Ib.*

27. Upon a bill, filed to compel a transfer of two hundred shares of stock, purchased by the defendant, with money advanced by the complainant upon the following order, viz., "Please pay to order of D. M. W. \$5000, for which he will give you a receipt, to be paid in stock of the Newark Plank Road Co., say two hundred shares, or money return in same proportion, at that rate, \$25 per share;" held, that the meaning of the contract was, that if the defendant could not, or did not, buy the stock at par, he should return the money; that when he purchased the stock with complainant's money, he held it as trustee for complainant; and that he must transfer the stock to the complainant, and account for all the dividends, with interest. *Stevens v. Wilson*, 447

See RAILROAD CHARTER, 1.
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USURY, 4.

CONTRIBUTION.

See TRUST FUND.

CORPORATION.

See BRIDGE.
CHARTER.
MUNICIPAL CORPORATION.
RAILROAD CHARTER.

COSTS.

Equity has not adopted the rule at law, that when a plaintiff sues in a representative capacity, and fails, no costs shall be awarded against him. But where the suit is brought in bad faith by the complainant, he will be ordered to pay the costs out of his own estate; and when brought upon an instrument obtained by the decedent by a breach of faith, costs will be ordered to be paid out of the estate of the testator. *Shepherd's Executrix v. McClain*, 128

See LEGACY, 7.

COUNTY.

See BRIDGE.

COVENANT.

1. A covenant made by the grantor in, or at the time of, the conveyance of land, relating to the land, runs with the land, and enures to the benefit of any subsequent purchaser from the grantee or covenantee. *Brewer v. Marshall*, 337
2. A covenant made by the owner of land with a stranger to the land to which it relates, will not run with the land when conveyed away by the covenantor, so as to be a burden upon it, although the deed containing the covenant may convey other land which the covenant was intended to benefit. *Ib.*

3. A covenant will not run with land so as to be a burthen upon it in the hands of a purchaser, unless there be some privity of estate between him and the covenantee. *Ib.*

4. A covenant may amount to a grant, and thus create an easement, and impose a servitude upon the land of the covenantor; in which case the land will be liable in the hands of every subsequent purchaser, to the burthen of such servitude. *Ib.*

5. A covenant not to sell marl from a certain tract of land, or not to carry on any specific business upon it, does not create an easement, or impose a servitude; it is only a personal covenant. *Ib.*

See APPRENTICE, 1-3.
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See DEBTOR AND CREDITOR.
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See PLEADING, 3, 6.
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DEBTOR AND CREDITOR.

This court will not, at the suit of a creditor, restrain the alienation of property alleged to be held in trust for the widow, if the party applying is a creditor at large, without any judgment or claim that would be a lien on the property if it was held by the debtor in his own name. *Holdrege v. Gwynne*, 26

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CREDITORS.
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HUSBAND AND WIFE, 13-16.
SALE, 4.

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See PRACTICE, 10.

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See MUNICIPAL CORPORATION, 1-4.

DEED.

1. If a complainant, who alleges that a deed was delivered without his authority and contrary to his instructions, afterwards, with full knowledge that his instructions had been disobeyed by his agent, brings a suit at law for the price, and prosecutes it to final decision, this is an affirmance of the delivery, by which he is bound; and he cannot afterwards maintain a suit in this court to set aside the delivery of the deed, on the ground that he was mistaken in another matter, the amount which the defendant had agreed to pay for the farm. *Titus v. Phillips*, 75
2. A deed for land, the legal title to which was not in the grantor at the time of the conveyance, is inoperative at law. *Howe v. Harrington*, 495
3. Covenants of warranty in a deed executed by an attorney, whose power only authorized him to sell and convey, and contained no authority to covenant, do not bind the grantor. Such deed, as against him, must be considered as a deed of bargain and sale, without covenants, and will not, by estoppel, convey after acquired property. It would, however, convey the equitable title of such grantor, if he had any. *Ib.*
4. If an agent, under a power of attorney, convey land under circumstances that make the conveyance a fraud on his principal, and the purchaser has notice of the facts, the title in his hands will be affected by the fraud, and equity will not aid him in removing defects in his legal title. *Ib.*
5. Where a grantor places a deed in the hands of a third party, together with a due-bill, with instructions not to deliver the deed to the grantee until he should sign the bill, and the deed was de-

livered to the grantee without his being required to sign the bill, and accepted by him under the honest belief that the amount of the encumbrances which he thereby agreed to assume was the whole consideration, it is a case of mutual mistake of fact, against which a court of equity will relieve. *Titus v. Phillips*, 541

6. An action at law for the amount of such due-bill, being a part of the consideration of the deed, will not be construed an affirmation of the delivery, and estop the grantor from setting up that the deed was not his, where it clearly appears that the deed was delivered to the grantee without the authority of the grantor, and that the circumstances under which the delivery was made were not known to the grantor until the trial of the action at law. *Ib.*

See CONTRACT, 22-3.
EQUITABLE MORTGAGE.
MORTGAGE, 2, 3, 4, 13.

DELIVERY, AFFIRMANCE OF.

See DEED, 1, 6.

DEMURRER.

See PLEADING, 5.

DEPOSIT.

See EQUITABLE MORTGAGE, 1.

DESERTION.

See DIVORCE, 4, 6, 13.

DISCOVERY.

See HUSBAND AND WIFE, 12.

DISMISSAL.

See PRACTICE, 11, 17, 18.

DIVORCE.

1. The recriminatory plea of adultery to a petition for divorce on that ground, must be clearly set out in the answer. *Jones v. Jones*, 33
2. In a suit for divorce on the ground of adultery, the court cannot lay hold of any matter not properly put in issue, on the ground that public policy and public morals require it. *Ib.*
3. An act of adultery committed by the husband and forgiven for years, should not be held to compel the husband to submit, without redress, to the faithlessness and unrestrained profligacy of his wife. It is better to hold that when the erring party is received back and forgiven, the marriage contract is renewed, and begins as *res integer*, and that it is for the party, and not for the courts, to forgive the new offence. *Ib.*
4. The evidence in this case held not sufficient proof of residence necessary to give the court jurisdiction; neither party residing here at the time of the desertion. *Goldbeck v. Goldbeck*, 43
5. Where it is shown that there was no marriage ceremony, proof of cohabitation as man and wife will not prove marriage; it is necessary that a contract, consented to by both parties, should be shown. *Ib.*
6. When a husband upon disagreement with his wife, and her declaring that she will not live with him, assents to her going where she chooses, and furnishes her with money for her support, and never insists as a condition of her support, that she shall perform her duties as a wife, although he asks and entreats her to come back, it has too much the character of a friendly arrangement to be called willful, obstinate, and continued desertion. *Ib.*

7. In a bill for divorce *a mensa et thoro*, and for alimony, on the ground of extreme cruelty, the complainant has the burthen of proof, and must sustain her case by something more than equally balanced testimony. *Fischer v. Fischer*, 300

8. A general charge that the wife is an adulteress, is not sufficient to support a bill for divorce. The adultery must be designated, either by the name of the adulterer, or by circumstances, and the time when, and place where, it was committed. *Mills v. Mills*, 144

9. Where the charge is of adultery with *divers* persons, whose names were unknown, and the only proof is of adultery with one person, who was well known to the complainant, the variance is fatal. *Ib.*

10. Bill dismissed, without prejudice to filing a new bill for adultery with the person against whom the crime was proved. *Ib.*

11. The publication and service of the order upon an absent defendant, instead of a notice, as required by Rule 145, after May first, 1867, is a formal objection; in this case it was waived upon the production of additional proof to remove substantial objections. *Rogers v. Rogers*, 445

12. It must clearly appear that the notice was sent to the defendant's post office address. That the solicitor was informed that the address to which it was sent was the defendant's address, without stating the source of information, or that he was *credibly* informed, and "verily" believes, is not sufficient. *Ib.*

13. Absence from the wife for three years, is not necessarily desertion in the legal sense of the term. The circumstances and manner of the desertion must be shown, that the court may determine the intent. *Ib.*

EASEMENT.

1. Where the owner of lands devised the same in two parcels, one to A, and the other to B, the fact that he was accustomed in his lifetime, to use an alley upon the land devised to B, as a means of egress from his stable upon the land devised to A, to the street, will not create an easement in B's land in favor of A, he being able to construct a way over the parcel devised to him, from the stable to the street, and such easement, therefore, not being *necessary* to the beneficial enjoyment of his land. *Fetters v. Humphreys*, 260

9. Discontinuous easements not constantly apparent, are continued or created by a severance, only when they are necessary, and that necessity cannot be obviated by a substitute constructed on or over the dominant premises. *Ib.*

3. The leading cases examined and commented upon. *Ib.*

See COVENANT, 4, 5.
POSSESSION, WRIT OF.

EJECTMENT.

See POSSESSION, WRIT OF.
JURISDICTION, 4.
SHORE OWNER, 3.

ELECTION.

See PRACTICE, 12.

EMINENT DOMAIN.

See CHARTER, 5.
LEGISLATURE, POWER OF, 4-6.
PUBLIC IMPROVEMENTS, 1, 2.

EQUITABLE MORTGAGE.

1. By the law of England, and of the state of New York, if a debtor deposits unrecorded title deeds with his creditor, as security for

his debt, such deposit constitutes an equitable mortgage on the land for the debt. And this court will not compel the creditor, when he resides or is found in this state with deeds in his possession for lands in New York, so deposited in that state, to surrender them until the debt is paid. *Griffin v. Griffin*, 104

2. The fact that a title deed is not recorded, nor in the possession of the grantee, might be sufficient notice to a purchaser or mortgagee of such equitable pledge as to put him upon inquiry. But a widow of the pledgor, who purchases the title of his children and heirs, without any money consideration paid, is not a purchaser for value so as to dispute such equitable mortgage because not registered. *Ib.*

3. If the owner of lands pledges his deeds, which are his property, as security for a debt, neither he nor his heirs are entitled to their return until the debt is paid, apart from the doctrine of equitable mortgage. *Ib.*

EQUITY OF REDEMPTION.

This court will restrain, by injunction, a mortgagee from selling the equity of redemption, by virtue of judgments, in satisfaction of the mortgage debt. *Van Mater v. Conover*, 38

See MORTGAGE, 3, 4, 6.

ESTATE BY CURTESY.

See HUSBAND AND WIFE, 5-9.

ESTOPPEL.

See DEED, 3, 6.

EVIDENCE.

1. A verdict for the defendant, in a suit at law brought against him by

the complainant, for the price of a farm conveyed to him by the complainant, is conclusive proof in this court, that the defendant did not agree to pay that price, or any part of it, for the farm. *Titus v. Phillips*, 75

2. If a defendant in a suit dies after the complainant has been examined as a witness, and his administrators are made defendants in his place, this evidence will be admitted at the hearing. The complainant was competent at the time when it was taken, and that is the test of admissibility. It cannot be rejected because the defendant was prevented from testifying by his death. *Marlatt v. Warwick*, 108
3. In a suit by an executrix in her representative capacity, the defendant cannot testify for himself, unless the complainant has first been sworn on her own behalf. *Shepherd's Executrix v. McClain*, 128
4. It is a rule in equity, as well as at law, that parol evidence will not be received to explain or vary a will, or other written instrument, or to solve any patent ambiguity. But surrounding circumstances may be shown to explain what might seem an ambiguity on the face of a will. *Halsted v. Meeker's Executors*, 136
5. Where a bill is filed for relief upon an alleged agreement, and the answer denies such agreement, the complainant must prove it by two witnesses, or evidence equal to two witnesses. *Bird v. Styles*, 297
6. An agreement denied by a responsive answer, must be proved by two witnesses, or proof equivalent to that. The complainant is not a competent witness, where any of the defendants are sued in a representative capacity. *Force v. Dutcher*, 401
7. The evidence of a defendant who has no interest in the event of the

suit, and is unnecessarily made a party, is competent, though the complainant sue in a representative capacity. *Harrison's Adm'r v. Johnson*, 420

8. The rule in equity is, that the responsive denial of an answer must be overcome by two witnesses, or evidence equivalent thereto. *Vandegrift v. Herbert*, 466

9. The oaths of two complainants in the same cause, made by the statute competent witnesses for themselves, will not be considered as destroying the effect of the responsive denial of the answer, unless they seem to the court to be entitled to the weight of the oaths of two credible witnesses; and, in considering their weight, the fact of the interest of these witnesses as parties to the suit, must be taken into consideration. *Ib.*

10. Evidence to show that an alleged intestate left a will, and that, therefore, the grant of administration was unlawful and void, cannot be received in a suit in this court. *Quidort's Adm'r v. Pergeaux*, 472

See DIVORCE, 4, 5, 7.

HEARING.

HUSBAND AND WIFE, 12.

USURY, 2, 3.

EXCEPTIONS.

See PRACTICE, 5, 9, 22.

EXECUTION OF INSTRUMENT.

It is material to the execution of an instrument by an illiterate person that it be correctly read to him. *Suffern v. Butler*, 220

EXECUTORS.

1 Where executors, directed to make a sale of the real estate of their testator, neglect their duty, and fail to obtain therefor as high a sum as might have been obtained

but for their own default, they will be compelled to make up the deficiency. *Fisher v. Skillman's Executors*, 229

2. An executor is liable for funds voluntarily placed in the hands of a co-executor and wasted. *Ib.*

3. An executor who delivers a mortgage to be canceled, is responsible if the debt be thereby lost. *Ib.*

See APPRENTICE, 2.

FRANCHISE.

See CHARTER, 5, 14, 15

RAILROAD CHARTER, 1, 3, 4

FRAUD.

1. To set aside a deed to a creditor on the ground of fraud, it must satisfactorily appear from the whole testimony, that the grantee took the conveyance of the property with a view to protect the property of the debtor from his other creditors, and not to save his own debt. *Demarest v. Terhune*, 45

2. The fact that the grantee in a conveyance of real estate alleged to be in fraud of creditors, is of kin to the grantor, is not of itself, alone, evidence of fraud. *Ib.*

3. Where a conveyance is sought to be set aside on the ground of fraud, the question must be, was the deed made honestly to secure a debt, or was it made to defraud creditors *Ib.*

See DEED, 4.

HUSBAND AND WIFE, 13.

SALE, 2-5.

SHERIFF'S SALE, 2, 3.

FRAUDS, STATUTE OF.

1. The statute of frauds is not a good defence in the case of a resulting trust arising by implication of law, or of actual fraud. *Brannin v. Brannin*, 212

2. When a defendant in execution, or the heirs of a decedent, rely on the promise of some one to buy the property for their benefit at the sale under the execution, and in consequence neglect to attend the sale, or bid for the property, and the person trusted buys for his own benefit, a court of equity will hold such purchaser a trustee, notwithstanding the statute of frauds. *Ib.*

3. The application of the principle cannot be invoked in this case. *Ib.*

See CONTRACT, 15, 24-5.

GRANT.

See CHARTER.

LEGISLATURE, POWER OF.

GRANTEE AND GRANTOR.

See DEED, 2, 3, 5, 6.

GUARDIAN AND WARD.

If a guardian, with the consent of his wards when of age, agree to give time for the payment of a security in his hands belonging to them, upon receiving the guaranty of a third person, at a charge of ten per cent., the guardian, in the settlement of his accounts, will be allowed the ten per cent. paid under that arrangement. *Burnham v. Dalling*, 132

See HUSBAND AND WIFE, 1.
RESULTING TRUST, 1.

HABEAS CORPUS.

See INFANT, 2.

HEARING.

No defence can be allowed at the hearing which is not set up in the answer, and no evidence can be received on any issue not raised

by the pleadings. *Burnham v. Dalling*, 132

See PLEADING, 2.
PRACTICE, 10.

HEIR-AT-LAW.

See HUSBAND AND WIFE, 9, 11.
REAL AND PERSONAL ESTATE 5.

HIGHWAYS.

1. The owner of lands abutting on a public street, is presumed to own the land in front to the middle of the street, subject to the easement of the public highway. *Glasby v. Morris*, 72
2. The municipal government of the city of Elizabeth had not, until 1863, the power to construct drains or sewers under the public streets. It was charged with keeping them in repair, and no one could, without its permission, open or disturb the surface of the streets in front of the land of another. *Ib.*
3. A permit to open a street for the purpose of laying a drain, is not to be construed as a grant of a right to lay and continue a drain, but simply as what it imports to be, a license to disturb the surface of the street. *Ib.*
4. The person laying a drain by such permit, has no right to maintain it as against the owner of the land on that side of the middle of the street on which the drain is. *Ib.*

See INJUNCTION, 1.
MUNICIPAL CORPORATION.

HUSBAND AND WIFE.

1. The power of a guardian over the person and property of an infant ceases at her marriage. From that time such guardianship devolves upon the husband. He can enter upon her property and permit others to enter upon it, without committing a trespass; he can also

- makes leases voidable by her upon his death, or by his heirs at her death. *Porch v. Fries*, 204
2. An acknowledgment by a married infant is void. *Ib.*
 3. The husband of a married infant cannot sell or dispose of the growing wood or timber on the real estate of his wife. *Ib.*
 4. The deed of a married infant is void when it attempts to convey the wood and timber separately, as when it attempts to convey the soil with them standing upon it. *Ib.*
 5. By the married women's act (*Nix. Dig.* 503,) in cases coming within the provisions of that act, the husband has, during her life, no interest or estate in the lands of his wife. She can sell them with his assent, and if she so sells and conveys them, she conveys them free from any interest or estate of her husband. *Ib.*
 6. That act destroyed the estate of tenancy by the curtesy initiate. *Ib.*
 7. The married women's act, although inconsistent with the estate by curtesy initiate, does not defeat the husband's curtesy at the death of the wife, provided she has not aliened her estate before. The act only protects her estate during her life; it does not, at her death, affect the law of succession as to real or personal estate. *Ib.*
 8. Neither a husband nor his lessees may commit waste upon lands in which he has only an estate by the curtesy. *Ib.*
 9. A lease, made by the husband of a married infant of her lands, becomes valid for his life, by the vesting of the estate by curtesy; and the heirs-at-law, being entitled to the reversion, have such privity of estate as will enable them to call the life tenant and his lessees to account for wood and timber cut, as well during the life, as after the death of the infant. *Ib.*
 10. Where the husband of a married infant permits the felling of trees upon her lands, or severing any part of her realty, and the change of the real to personal property for his own benefit, it will retain its character of real property so as to pass to those who would have been entitled to it if not severed. *Ib.*
 11. The heirs-at-law are entitled to an account for so much of the timber as has been taken away, and an injunction to restrain the removal of so much as still remains on the land. *Ib.*
 12. The peculiar relations of husband and wife will not protect her from making a discovery relating solely to her own conduct, and affecting only her own interests. In such case she may, under the recent acts, even be compelled to testify against herself. *Metter's Administrators v. Metter*, 270
 13. A deed taken in the name of the wife, for property purchased with her separate estate, is no fraud upon creditors, even if taking title in her name was to avoid any claim by judgment against her husband, for debts which he then owed. *Quidort's Administrator v. Pergeaux*, 472
 14. But where the balance of the purchase money for such property was paid out of the earnings of a business carried on in the name of the wife, but to which his skill and labor largely contributed, such property will be decreed to be held by the wife in trust for his creditors, subject to her claim for the money advanced out of her separate estate. *Ib.*
 15. A husband may, as against his creditors, allow his wife to have for her separate use, the earnings of herself and of the labor of their minor children, but he may not give to her to be invested in her own name, the proceeds of his own business, skill, and labor. *Ib.*
 16. The law was intended to protect the property and earnings of the

wife, and not those of the husband against his creditors. And when they mix them so that they cannot be separated, the husband cannot make a distinct gift to his wife of her own earnings, and they remain as at common law, his property. *Ib.*

IDIOT.

See LUNACY, 3, 6,
PRACTICE, 18.

INADEQUACY OF CONSIDERATION.

See SALE, 2, 3, 4.
SHERIFF'S SALE, 2.

INDICTMENT.

See INJUNCTION, 4.

INFANT.

1. The father is entitled to the custody of his children; and in no case will the courts take them away from him when he has them in his custody, fairly obtained, except where the father, from notorious grossly immoral conduct or great impurity of life, with which his children come in contact so as to be in danger of contamination, is an improper person to have the custody of his own children. Infants under seven years of age are an exception, under the act of March 20th, 1860, (*Pamph. L. 437.*) *Baird v. Baird*, 194
2. Upon a *habeas corpus* brought by the father for his children, the court will not, as a matter of course, order them to be delivered up to him, but only in case they are improperly restrained of their liberty. The office of the writ is not to recover the possession of the persons detained, but to free them from all illegal restraints upon their liberty. *Ib.*
3. If the infants are of sufficient years or discretion to judge for themselves, they will be examined, and if they are satisfied and wish to remain, the court will hold that they are not unduly deprived of their liberty, and will permit them to go with which of the parties they may elect. When they are too young to exercise any discretion, the court will determine for them, and adjudge the custody to such parent as may be considered most advantageous for the infants. *Ib.*
4. All the children were adjudged to remain in the custody of the mother; the two youngest, because under seven years of age, and the mother a fit person to have the custody of them; the four eldest because, upon examination, they proved not to be restrained by their mother, those capable of making their election preferring to remain with her; and in the case of those not so capable, because it was adjudged to be for their benefit and advantage to be brought up with the others. *Ib.*
5. A father is bound to support his infant children, if of sufficient ability to do so, though they have estates of their own, given expressly for their maintenance; if he is not able to support them, so much of the income of such estates as is necessary, will be ordered to be applied to that purpose though bequeathed with directions to be accumulated during minority. *Tompkins v. Tompkins' Executors*, 303
6. Where infant children have, by their father, filed their bill alleging his inability to support them, and praying income from their estates for that purpose, the fact of their father's ability will be inquired into and determined by the court; the admissions of the answer are not sufficient. *Ib.*
7. If a man agree to convey lands, part of which belong to himself and part to his infant step-daughter, and receive a sum as part payment under that agreement, with

which he purchases a mortgage that includes the infant's part, so as by foreclosure to give title, the mortgage will belong to him, and is not held in trust for the infant, the consideration for which the money was paid being the personal undertaking of the vendor, and not the property of the infant, which was in no wise affected by the contract. *Johnson v. Dougherty*, 406

See HUSBAND AND WIFE, 1, 2, 3, 4, 9, 10.

REAL AND PERSONAL ESTATE, 3, 4.

INJUNCTION.

1. In general, a trespass will not be restrained by injunction. But where the trespass is an obstruction to a public highway, entitled to be used by all citizens, it is a nuisance of a character which this court will prevent by injunction. *Morris Canal v. Fagan*, 215
2. The denial of the answer being fully responsive to the allegations of the bill, and supported by the affidavits, injunction dissolved. *Ib.*
3. Where the facts upon which the equity of the bill depends, are positively denied by the answer, the injunction will generally be dissolved. *Suffern v. Butler*, 220
4. An injunction will not be granted, where it would cause great injury to the defendants, and might be of serious detriment to the public, without corresponding advantage to the complainant. *Torrey v. C. & A. R. Co.*, 293
5. An injunction will not invariably be dissolved, even upon a full denial of the equity of the bill. It is always a matter in the discretion of the court. *C. & A. R. Co. v. Stewart*, 489

See EQUITY OF REDEMPTION.
JURISDICTION, 4.
NUISANCE, 4.
PLEADING, 2, 7, 8.
PRACTICE, 2.

INSOLVENT CORPORATION.

See BANKING, 4-7.

INTEREST.

See LEGACY, 2, 4.
USURY, 4.

JURISDICTION.

1. An account settled in the Orphans Court, and within the jurisdiction of that court, cannot be inquired into in a collateral suit in this court. *Voorhees v. Voorhees' Executor*, 223
2. A suit in equity may be sustained to ascertain the height to which the owner of a dam is entitled to flow back water upon the lands above the dam. *Carlisle v. Cooper*, 241
3. A court of equity has power, in cases where there is a clear debt or duty to be paid or performed by the testator or his executors at a future day, to order that sufficient assets for the discharge of it be retained and secured by the executor, before distribution of the estate. There is no adequate remedy at law in such case, and the creditor ought not to be left to follow the legatees, or resort to the refunding bonds for the share of each. *Petrie v. Voorhees' Executor*, 285
4. The remedy at law by indictment, is adequate to remove an encroachment on a public street by erecting a building extending into it. The courts of law are the proper tribunals to settle the fact of encroachment. For such cases, a court of equity will not interfere by injunction, unless under peculiar circumstances of pressing irreparable injury. *Attorney General v. Heishon*, 410
5. Uncertainty in the description of the premises in the declaration of ejectment, in a suit brought in the Supreme Court, can only be reme-

died in that court. *C. & A. R.*
Co. v. Stewart, 489

6. The Supreme court is the appropriate tribunal for determining questions of law relative to the right of possession of lands, which may arise and be tried in an action of ejectment. And if they arise incidentally in a suit in this court, it would be proper to refer them to a court of law for its determination. *Ib.*

7. That a party, by pleading unadvisedly in a suit at law, may run the hazard of being beaten, and paying the costs, is not a sufficient ground for the interference of a court of equity. *Ib.*

8. It is a settled rule that on an appeal from a decree of the Orphans Court, no questions can be raised in this court, not raised and decided in the court below. *Trimmer's Executor v. Adams,* 505

See ACTION, 1.

ADMINISTRATION, 1, 2.

DIVORCE, 4.

MUNICIPAL CORPORATION, 5, 6.

NOTES, 1, 3.

PRACTICE, 1, 2.

LACHES.

See CONTRACT, 4, 5, 17.

LAND.

If lands descend or are devised subject to a mortgage not made by the decedent, the heir or devisee takes *cum onere*, unless the decedent shall have assumed the debt in such a manner as to show an intention to charge his personal estate. Making himself or his representative liable to be called on by the mortgagee, is not sufficient, of itself, to charge the personal estate in relief of the lands. *McLenahan v. McLenahan,* 101

LANDS UNDER WATER.

See CHARTER, 3.
WHARF, 3.

LEASE.

See HUSBAND AND WIFE, 1, 9.

LEGACY.

1. A direction to invest twenty thousand dollars in some safe investment for a daughter, must be held to mean that sum *in money*, not in the stocks or securities in which the testator had invested the bulk of his estate, at their nominal value. *Halsted v. Meeker's Executors,* 136
2. When a sum is directed to be invested for the benefit of a child of the testator, it must be invested at the end of a year from his death, and the child is entitled to the interest to accrue from the end of the year. *Ib.*
3. Where a legacy is left to A. for life, with remainder over to his children, a debt due from A. to the testator cannot be set off against the principal of the trust fund. The whole must be invested for the benefit of the tenants in remainder. *Voorhees v. Voorhees' Executor,* 223
4. Where an executor holds the notes of his testator's legatee, although they cannot be offset against the interest due such legatee, yet a court of equity would allow them to be used in payment of the interest during his life. *Ib.*
5. Under a bequest by a testator of his property, "to be equally divided, share and share alike, between my children and their legal heirs, that is to say, to J. S., D. B. S., W. S., A. S., and C. H., each a share, and the children and heirs of A. L. S., and of M. H., and of C. M. F., each a share," the legatees take *per stirpes*. *Fisher v. Skillman's Executors,* 229

6. Under a bequest as follows, to wit: "I give and bequeath to my son, D. K., and his heirs, the sum of \$300, if he or they shall appear or claim the same within three years from the time of my decease," held that a demand by D. K., by his attorney duly authorized by a special power executed for that purpose, was sufficient to entitle him to the legacy; it was not necessary for him to appear in person. *Keeler's Executor v. Keeler*, 267

7. Costs to be paid out of the residue, on settling the estate, if the executor hesitated to pay the legacy from honest doubts of his liability, or at the request of the residuary legatees. *Ib.*

See WILL.

LEGATEE FOR LIFE.

See LEGACY, 3, 4.

LEGISLATURE, POWER OF.

1. The legislature has no power, by special act, to transfer to one man the property of another, without his consent, either with or without compensation. This want of power does not depend upon any constitutional restriction, but upon the fact that it is not the exercise of the power of making laws, or rules of civil conduct, which is the branch of sovereign power committed to the legislature. *Coster v. The Tide-water Company*, 54

2. A grant of power to one man to improve the property of another, without his consent, at an annual compensation to be fixed by commissioners to be appointed for that purpose, not limited to the cost of the improvement, or the interest on the cost, or the benefit received by the property, but to be fixed by the arbitrary discretion of the commissioners, is a grant to one of profit out of the land of another, to the extent that such compensation may exceed the cost, or interest on the cost. It, therefore,

is beyond the power of the legislature, and void. *Ib.*

3. The grant to one of the power to manage and improve the property of another, without his consent, and contrary to his judgment, even if exclusively for his benefit, is an infringement of the right of acquiring, possessing, and enjoying property, guaranteed to every one by the constitution. *Ib.*

4. The power of eminent domain is a legislative power; these powers, by the constitution, are vested in the legislature. Private property may be taken for public use, but only on adequate compensation. *Ib.*

5. The public use for which property may be taken by the power of eminent domain, is the use of the property itself by the government, or by the general public, or some portion of it; not by particular individuals, or for the benefit of certain estates. *Ib.*

6. Whether the use for which property is taken is a public use, is a question of law, to be settled by the judicial power. Where the use is a public use, the legislature are the sole judges of the necessity or expediency of exercising the power of eminent domain in the particular case. But it cannot evade the constitutional limitation of its power, or make a private use a public one, simply by enacting that it is such. *Ib.*

7. The laws regulating partition fences, party walls, the enclosure of woodlands, the ditching and embanking of meadows, and other like police regulations, whether general or special laws, are an ancient branch of legislation. Their object is to regulate the management and enjoyment of property by the owners, or a majority of them, at their common expense, and they are a proper and constitutional exercise of legislative power. *Ib.*

See BRIDGE, 2.

CHARTER, 6, 14.

LIMITATIONS, STATUTE OF.

See ACTION, 2, 3.

LUNACY.

1. This court can and will order a second inquisition of lunacy when the first is irregular or unsatisfactory, from the finding being against evidence, or by a mistake of the jury as to their duty. Or it will order a second inquisition at some time after the first, if it appears that there is an evident change in the condition of the subject. *In the matter of Sarah Collins*, 253
2. The substitution of a new commissioner for one appointed by the Chancellor, without his approval or confirmation, no one of the commissioners being a master of the court, is such an irregularity as would set aside the inquisition if urged for that purpose at or before the motion for confirmation, but would be without effect, upon the argument of a rule to show cause why a commission should not issue. *Ib.*
3. Imbecility, for which a commission will issue, must amount to unsoundness of mind. *Ib.*
4. The presumption of law is not against the soundness of mind of a person one hundred years of age. *Ib.*
5. Where unsoundness of mind is proved, and the question is as to the degree of it, and it appears that the subject never had any property to control until the issuing of the commission, the court and inquest would and should look at the value and importance of the property to be controlled by her, and also to the persons by whom she is surrounded, and their conduct. *Ib.*
6. Idiots and lunatics must sue in equity, by their committees or guardians; in this state, by their guardians. *Dorsheimer v. Roorback*, 438

See ATTACHMENT, 3.

MAINTENANCE.

See INFANT, 5, 6.

MARRIAGE SETTLEMENT.

1. If, in a marriage settlement, the intended wife conveys all her property which she now has, or may hereafter acquire, to trustees, this will not of itself, at law, convey her after acquired property. It will be treated in equity as an agreement to convey, and enforced as such, if necessary to carry out the objects declared in the marriage settlement. *Gevers v. Wright's Executors*, 330
2. A provision for children in a voluntary settlement made after marriage, is not a sufficient meritorious consideration to compel performance by the party himself making the settlement, but is as against his representative. In an antenuptial settlement made in consideration of marriage, a provision for children is upon meritorious consideration, and will be enforced. *Ib.*
3. An antenuptial settlement, which, upon its face and by its recitals, was intended to secure to the wife the absolute control over all her own property, including what might come to her after marriage, and which gave to her absolute power of disposition, either to her children or strangers, and gave the property to the children of the marriage, only on failure of disposition, will not be enforced in favor of the children by construing words of grant into a covenant to convey, and enforcing the conveyance. Such construction will only be made to fulfill the intention of the parties. *Ib.*
4. A marriage settlement, by which an intended wife conveyed to trustees, all property which she then had, and to which she might thereafter become entitled, &c., does not, at law, convey the after acquired

property. Equity will construe such instrument as a contract to convey, and enforce its performance, only when necessary to effect the plain intent of the parties. *Steinberger's Trustees v. Potter*, 452

- 5 Such settlement construed as an agreement to convey only such property as the wife might acquire during marriage. *Ib.*

MARRIED INFANT.

See HUSBAND AND WIFE, 2, 3, 4, 10.

MARRIED WOMEN'S ACT.

See HUSBAND AND WIFE, 5, 6, 7.

MASTER'S REPORT.

See PRACTICE, 5-9.

MERITORIOUS CONSIDERATION.

See MARRIAGE SETTLEMENT, 2.

MISTAKE.

See CONTRACT, 7.
DEED, 1, 5.
MORTGAGE, 6.
NOTES, 3.

MORTGAGE.

1. A person who, with the funds of the mortgagor, and as his agent, has paid off a mortgage, cannot keep the security alive by having it assigned to himself. And a purchaser from the mortgagor can defend a suit to foreclose it, without the mortgagor being made a party. *Shepherd's Executrix v. McClain*, 128

2. A deed absolute on its face, intended and made only as security for a debt, is a mortgage. When the defeasance or agreement showing that it is such security is in writing, the statute declares it

to be a mortgage, and requires it to be registered as such. *Clark v. Condit*, 358

3. An equity of redemption is a right or estate in lands, and cannot be released or conveyed except by writing. No verbal agreement will convert a mortgage into an absolute deed. Whether a surrender and cancellation of a written defeasance would, doubted. *Ib.*

4. If a mortgage was given in the form of an absolute deed, and the defeasance withheld from the records for the purpose of misleading and delaying the mortgagor's creditors, the right of redemption will not thereby be lost. In such case, the aid of the court is not asked to enforce a fraudulent instrument. The fraud, if any, is in the deed, not in the defeasance which the complainant claims to enforce according to its legal effect. The defeasance is honest as between the parties, and was not to injure creditors. *Ib.*

5. A power to sell mortgaged premises for the payment of the mortgage debt, given to the mortgagee by the mortgage, is a valid power. It is liable to great abuse, and the exercise of it will be jealously watched. But sales under it, fairly made, will not be set aside. *Ib.*

6. If a mortgage on lands is paid off by the purchaser of the equity of redemption, and canceled in fact and on the record by the purchaser, while under the misapprehension that his title is good, he cannot, upon discovery that his title is not good, have the canceling set aside and the mortgage declared in force, on the ground that had he then known of the defect in his title, he would have taken an assignment of the mortgage to protect his title. The mistake must be a mistake as to matter of fact, and not as to a question of law. *Bentley v. Whittemore*, 366

7. Two mortgages, given to secure four notes, and to indemnify an

endorser, were held to be paid and satisfied; the payment being denied by the person holding them, on oath, and testified to by the assignee of the mortgagor, who paid them, and shown by the written surrender and receipt of the holder. *Chapman v. Hunt*, 414

8. When the owner of property produces a mortgage made by him upon that property, with the seals torn off, and gives it to a party about purchasing the property, stating that it was paid and satisfied, and that he could take it and have it canceled of record, the fact that the mortgage has no receipt of payment endorsed upon it, and that the bond is not produced, is not sufficient to put the purchaser upon further inquiry. *Harrison's Adm'x v. Johnson*, 420

9. The fact that there is no receipt by the mortgagee or his executors, &c., upon a mortgage presented to the clerk for cancellation, does not make its cancellation illegal, though such cancellation is not *conclusive* evidence of its payment. Its production with the seals torn off, is sufficient authority to the clerk where there is nothing to arouse his suspicions. *Ib.*

10. A mortgage canceled upon the record, will not be revived against a *bona fide* purchaser of the property, for full value, and without notice in law or in fact, that it was a subsisting encumbrance at the time he purchased. *Ib.*

11. The cases examined and commented upon. *Ib.*

12. A mortgage executed by a married woman, as a *feme sole*, she living apart from her husband, upon her separate property, to secure a debt contracted by her and for her benefit, is a valid lien upon such property. *Harrison v. Stewart*, 451

13. In equity, a deed absolute on its face may be shown by parol, to have been intended by the parties as security only for money ad-

vanced; and, in such case, as between the parties, it will be treated as a mortgage. But the proof in this cause, held not to show such intention. *Vandegrift v. Herbert*, 466

14. A mortgage taken with actual notice by the mortgagee, of an existing, unrecorded mortgage, will be postponed in favor of the prior mortgage, and that in the hands of an assignee, without notice. *Conover v. Van Mater*, 481

15. Bonds and mortgages have never been placed upon the footing of commercial paper; and an assignee takes them subject to all equities between the assignor and other parties, whether latent or not. *Ib.*

See EQUITABLE MORTGAGE.
LAND.
PLEADING, 6.

MUNICIPAL CORPORATION.

1. If the owner of a tract of land lays it out in lots and streets, by a map publicly exhibited or filed in the proper public office, and sells lots laid out on said map by a reference thereto, he thereby dedicates to the public those streets on said map, along which lots have been sold. Such dedication does not make them public streets or highways until the proper municipal authorities have accepted them as such, or in some way ratified the dedication. *Pope v. The Town of Union*, 282

2. The proper municipal authorities, charged with laying out and maintaining streets, have the right, on the part of the public, to take and appropriate the lands so dedicated, for the purpose for which they were dedicated, and to grade and construct streets and highways upon them without further compensation; or in cases where it is required to vest the title in the public, upon a nominal consideration. *Ib.*

3. The map or conveyance may qualify the dedication. But laying out land in lots and streets, clearly marked as such, and selling lots bounded on such streets, without any qualification, must be held as an absolute dedication. *Ib.*
4. An intention to qualify the dedication concealed within the breast of the owner, or not expressed in some way on the map, or in the conveyances, cannot be regarded. *Ib.*
5. Whether a contemplated street would not be unwise and injudicious, and even if it would be productive of great injury to private property, cannot be considered by this court. It is a matter exclusively within the province of the municipal authorities. *Ib.*
6. Whether the proceedings of municipal authorities have been according to law, is within the jurisdiction of the courts of law. *Ib.*
7. The general act relating to roads, does not apply to towns or cities the charters of which confer on the corporations the authority to regulate the streets. *Cross v. Mayor of Morristown*, 305
8. Where the charter of a city empowered the common council to regulate the public streets by ordinance, an alteration of the carriage-way or sidewalks cannot be made by the municipal authorities without the passage of an ordinance for that purpose. *Ib.*
9. An encroachment upon a street or public highway cannot be legalized by the mere lapse of time. *Ib.*
10. Where the city authorities widened the carriage-way and cut down the sidewalk of a public street, without pursuing the formalities prescribed by their charter, it was held that such acts, not operating as irreparable injuries to the complainant, who was the owner of a house and lot on such street, did not form the basis for an injunction; the same being merely trespasses and remediable as such. *Ib.*
11. A charter, giving power to a municipal corporation to ascertain and establish the boundaries of streets, does not thereby give to it power to authorize buildings to be erected within the boundaries of an established street or highway. *Attorney General v. Heishon*, 410

See HIGHWAYS, 2.

NE EXEAT.

1. The writ of *ne exeat* will issue only for an equitable demand; and an action for an account is an equitable demand for which it will issue. *MacDonough v. Gaynor*, 249
2. It must appear by positive proof that there is a certain sum actually due, except in account, when the proof must show *some* sum due, the amount of which may be sworn to according to belief. *Ib.*
3. The writ will be issued against a non-resident temporarily here, even if not in the state at the time; and it is not necessary that it should appear that he is about to depart to avoid the jurisdiction, if his departure will defeat the suit. *Ib.*
4. If the writ is served, no subpoena is necessary; and the party cannot be discharged upon affidavit, but must make answer. *Ib.*
5. In cases where the court feels constrained to discharge the writ, it will often require security to abide the decree. *Ib.*
6. A *capias* where a *ne exeat* should have been sued out, and a bond taken thereon, simply to appear at court in the cause on the first day of the next term, are irregular, and will be set aside. But the order being right, the defendants were ordered to give bond with security to answer and abide the decree of the court. Upon these terms, writ and bond set aside with costs. *Ib.*

NOTES.

1. The general rule is, that where a note is without consideration, relief cannot be had in equity on that ground merely. But where the note is negotiable, and not void on its face, and in case of a discontinuance or non-suit, might be held until the evidence of its being without consideration could not be had, and then a suit on it be brought against the administrators or the infant heir, to the amount of assets descended, a court of equity will order the security to be given up to be canceled. *Mettler's Administrators v. Mettler*, 270
2. A material alteration of a note by the payee, without fraudulent intent, though it avoids the note, does not deprive him of his right to recover the original debt. *Lewis v. Schenck and Smith*, 459
3. In such case the action for the recovery of the debt should be brought at law. But the alteration being made under misapprehension, and the discovery prayed by the bill being in some degree necessary to show the agreement and the mistake, jurisdiction of this case sustained. *Ib.*

NOTICE.

The mere filing in the office of the Secretary of State, of the survey of a railroad, is no notice to parties purchasing lands included in the survey. Such filing gives the railroad company neither title nor possession. *Central R. Co. v. Hetfield*, 323

See BANKING, 7, 8.
EQUITABLE MORTGAGE, 2.
MORTGAGE, 8, 10, 14.

NUISANCE.

1. The grant of a franchise to operate a railroad, does not confer the right to use upon it locomotives so constructed as to throw out burning

coals that may set fire to buildings along the line. But the road must be operated with engines so constructed as to cause the least danger. *King v. Morris and Essex R. Co.*, 397

2. That a building was erected after a railroad was laid out and constructed, is no impediment to relief against any nuisance arising from operating the road. The owner of a lot does not lose the right of using it for any lawful purpose, by reason of any erection on adjoining property, or any use to which the same was put while the lot was vacant. *Ib.*
3. Where a nuisance is an injury to the property of an individual, a suit to restrain it may be brought in his name, although many others are injured in the same way by it; and it is not necessary to proceed in the name of the Attorney General. The proceeding must be in the name of the Attorney General, only in case of a public nuisance, which is a nuisance that interferes with the enjoyment of a public or common right. *Ib.*
4. When a defendant, who has been doing what amounts to a nuisance disclaims the intention to continue it, and is proceeding with diligence to remove and abate it, the court will, if satisfied that the cause of complaint will be removed as speedily as practicable, refuse an injunction. *Ib.*

See INJUNCTION, 1.

ORDINANCE.

See MUNICIPAL CORPORATION, 8.

ORPHANS COURT.

See JURISDICTION, 8.

PARENT AND CHILD.

See INFANT.

PAROL.

See CONTRACT, 3.
EVIDENCE, 4.
MORTGAGE, 13.

PART PERFORMANCE.

Part performance, to take the contract out of the statute of frauds, must be something done with the actual or constructive assent of the party sought to be bound. A purchaser cannot, by taking forcible possession of the lands claimed upon an alleged parol sale, without the consent, and against the remonstrance of the owner, evade the provisions of the statute, on the ground of part performance. *C. and A. R. Co., v. Stewart*, 489

See CONTRACT, 24.

PARTIES.

See MORTGAGE, 1.

PARTITION.

1. A tenant in common has a right to partition in chancery, if he shows a title to a share. *Hay v. Estell*, 251
2. When the title of the complainant in a bill for partition is disputed, it will not be settled upon the hearing in this court, but the complainant will be compelled to establish his title at law first, and the bill will be retained until he can so establish his title. *Ib.*
3. But it must appear clearly to the court, that there is an actual dispute, either by direct statement, or by words that amount to a direct denial of title, and not by a mere possible inference from the pleadings or proofs. *Ib.*

See REAL AND PERSONAL ESTATE, 1-4.

PARTNERSHIP.

1. Property purchased by one partner with the funds of the partnership, in his own name, or that of his wife, will be considered as belonging to the partnership and held in trust for it. *Holdrege v. Gwynne*, 26
2. If R. enters into partnership with P. to continue for three years, and so much longer as R. should continue lessee of the stone quarries leased to him by M., and at the expiration of the lease, R. refuses to renew the lease with M., it having a covenant for renewal at his option, the partnership expires with the lease. R. was not bound to renew the lease and continue the partnership, if not expressly bound so to do by the partnership agreement. *Phillips v. Reeder and Prior*, 95
3. If articles of partnership provide for its continuance during the existence of a lease, renewable at the option of one of the partners, it is at the option of such partner to continue the partnership by renewing the lease, or to end it by refusing to renew. He has a right to refuse to renew for the purpose of ending the partnership. *Ib.*
4. That a partner, having the option to renew such lease and continue the partnership, may have talked and acted as if he intended so to do, will not bind him to renew if he made no contract to do it. *Ib.*
5. Upon the dissolution of a partnership, in which the articles provided that the effects, on dissolution, were to be equally divided among the partners, the property and effects of the firm belong to the individuals who composed it, as tenants in common; part of the former members of the firm cannot dispose of the property of any other member, without his consent. *Ib.*
6. If some of the members of a dissolved partnership dispose of the property of one of the partners,

without his consent, he may, at his option, call on them to account for its value. *Ib.*

7. In many cases, if some of the partners, after dissolution, continue the business with the property of the late firm, the retiring partner will be entitled to call on them for a share of the profits, as well as for his capital. *Ib.*

8. But this principle will not be applied to a case where the chief contribution to the business was personal skill and labor, and a new partnership was formed with strangers, merely because some of the property of the retiring partner was used in the new business, after being sold to the new firm by the continuing partners, without authority so to sell it. *Ib.*

9. A majority of the partners of a firm that is dissolved, have no right, without judicial proceedings, to compel another partner to sell or divide the property, or to choose an appraiser for the purpose of valuation, or, if he refuses, to choose appraisers themselves, and purchase or sell his share at such valuation. But if they have appropriated or sold the property, they must account to him for the real value of his share and interest therein. *Ib.*

10. A part of the partners cannot exclude from the partnership one of their number who has failed to pay in part of the amount which he agreed to contribute as his share of the capital; but if part of his capital has been paid in, accepted, and used, and the business has been commenced in the name of the firm, he is a partner until the partnership is legally dissolved. *Hartman v. Woehr and Stegmüller*, 383

11. A partner excluded from the business of the firm by the illegal acts of his co-partners, is entitled to an account of profits, and to his share of them, until the partnership is legally dissolved; and is entitled to a decree of dissolution,

on the ground of such illegal exclusion from the business. *Ib.*

See ACTION, 2, 3.
CHARTER, 12.

PERSONALTY.

See REAL AND PERSONAL ESTATE.

PLEADING.

1. An answer, simply averring that the facts stated in a paper, purporting to be the answer of another defendant in the cause, "are substantially correct as far as these defendants are concerned," is formally and substantially defective. *Carr v. Weld*, 41
2. Even upon a full denial of the equity of the bill, the court will, in its discretion, retain the injunction until the final hearing. *Ib.*
3. A defendant, in his cross-bill, cannot set up a case inconsistent with the case made in his answer to the original bill. *Jackson v. Grant*, 145
4. Where the cause is heard upon bill, answer, and replication, all the allegations of the answer responsive to the complainant's bill, must be taken as true; all other allegations set up in the answer by way of defence or avoidance, not amounting to a denial of the statements of the bill, denied by the replication, and not proved by the party setting them up, can have no effect on the decision. *Voorhees v. Voorhees' Executor*, 223
5. When a demurrer is too extensive, or bad in part, it must be wholly overruled. *Meller's Administrators v. Meller*, 270
6. A mortgage cannot be reformed upon a prayer in the answer to a bill to foreclose. It must be by cross-bill. *French v. Griffin*, 279
7. On a motion to dissolve an injunction, the separate answer of a co-defendant, not included in the in-

junction, 'cannot be regarded. *Van Syckel v. Emery*, 387

8. In a suit to restrain an action at law by reversioners, for waste in cutting timber, a justification of the waste, not alleged or set up in the bill, will be of no avail on a motion to dissolve the injunction. The right to the injunction must appear by the allegations in the bill. *Ib.*

9. It is not necessary to set up in the pleadings, as a defence, the statute of frauds, unless the contract against which it is set up, is that on which the relief prayed for is founded. *Force v. Dutcher*, 401

See DIVORCE, 1, 9.
HEARING.

POSSESSION, WRIT OF.

The mere right to an easement over land which another party is entitled to retain in possession, will not be affected by the execution of a writ of possession for the premises, in an action of ejectment. *C. and A. R. Co. v. Stewart*, 489

POWER.

See DEED, 3.
MORTGAGE, 5.

PRACTICE.

1. Where an answer fully denies the facts in the bill on which the equity to sustain an injunction depends, the injunction will be dissolved, provided the denial is upon the knowledge of the defendant, but not when the denial is of facts not within such knowledge, but on information only. *Holdrege v. Gwynne*, 26

2. The facts upon which the injunction depends must be verified by positive proof, annexed to the bill, or the injunction will be dissolved, even if the denial in the answer is

not sufficient for want of personal knowledge by the defendant. *Ib.*

3. The complainant, having failed to attach the required revenue stamp to the original writ, after the expiration of the time limited for the defendant to file his answer, attached the stamp and took a decree *pro confesso*; the defendant moved to set aside the decree. Motion denied with costs, but under the circumstances of the case, without prejudice to the motion being renewed within fifteen days, if the defendant could make affidavit of a good defence, and show what that defence is. *Disbrow v. Johnson*, 36

4. Such affidavit should be entitled in the cause. *Ib.*

5. It is the practice upon filing a report on exceptions to an answer, to take an order that the same shall be confirmed, unless cause be shown in eight days after the service of the same. *Weber v. Weitling*, 39

6. The appeal given by the act (*Nix. Dig.* 99, § 29,) is taken by filing exceptions to the master's report within eight days from the service of the rule, which is the mode of bringing objections to the reports of masters before the Chancellor to review. *Ib.*

7. Filing exceptions to a report is a sufficient and the usual showing cause against its confirmation. *Ib.*

8. Upon exceptions to a master's report on a question of fact, the court will come to a conclusion upon the evidence, irrespective of the master's opinion. The report is not entitled to the same weight as the verdict of a jury, upon a motion for a new trial in a court of law. *Holmes v. Holmes*, 141

9. The report of a master upon a question of fact will not be overruled, although the evidence on which it is founded is vague and not altogether satisfactory if it does not appear that his conclu-

- sion was unwarranted by the evidence. *Ib.*
10. Where, upon the hearing, the evidence as to the facts in controversy is entirely satisfactory, the court will not order an issue or wait for the result of a trial at law, before making a decree. Nor will it on the hearing refuse relief because the complainant has delayed his suit, if it is clear upon the evidence that he ought to have relief. *Carlisle v. Cooper*, 241
11. A bill will not be dismissed upon motion of the defendant, for want of equity, where the court cannot adjudge that under the bill the complainant will not be entitled to relief at the hearing, upon any evidence that he can offer. *Ib.*
12. A suitor cannot be compelled to elect between a suit in equity to prevent future injury, and a suit pending at law to recover damages for past injury. *Ib.*
13. A suit in equity cannot be delayed until the determination of a suit at law, where it is for a different object. *Ib.*
14. To bar a claim against an estate, under the rule limiting creditors, (*Nix. Dig.* 589, § 70,) there must be proof that the notice was advertised or set up as required by law. *Petrie v. Voorhees' Executor*, 285
15. In general, a defendant cannot have any positive relief against the complainant, even as to the subject matter of the suit, except by cross-bill. *Scott v. Lalor's Executors*, 301
16. But where the complainant bases his right to relief upon an agreement for farming on shares, and prays for an account and equal division of part of the proceeds taken by the defendant, the defendant is entitled to an account of so much as has been received by the complainant, and will not be compelled to file a cross-bill for that purpose. *Ib.*
17. A bill seeking equitable relief must be dismissed when its allegations are denied by the answer, and unsupported by the proofs. *Central Railroad Co. v. Hetfield*, 323
18. A bill filed in the name of an idiot by a volunteer, styling himself her next friend, not appointed her guardian upon inquisition found, nor authorized by the court to file the bill as her next friend, will be dismissed on motion of the defendant. *Dorsheimer v. Roorbach*, 438
19. A petition to the Orphans Court to set aside an account as illegally and improvidently allowed, and also to open the same for mistake and fraud therein, need not specify in what the fraud or mistake consists, or the items alleged to be affected thereby. *Trimmer's Executor v. Adams*, 505
20. When an account is opened solely on the ground of fraud or mistake, proved to the satisfaction of the court, the settlement under the 27th section of the Orphans Court act, should be confined to correcting the items in which the fraud or mistake is proved, and such part or parts of the accounts as are affected by the change so made. The residue of the account not affected by such proof, should be allowed to stand as settled. *Ib.*
21. But when an account is set aside as improvidently allowed, contrary to the express provisions of the statute, it should be set aside altogether, and the parties allowed to contest every item of it. *Ib.*
22. When the decree of the Orphans Court, setting aside the account, is affirmed, exceptions may be filed in the Prerogative Court, and the matter continued there until the final settlement of the account. *Ib.*
- See DIVORCE, 8, 10, 11, 12.
 JURISDICTION, 7.
 LUNACY, 1, 2, 6.
 NE EXEAT.
 PARTITION, 2.
 PRACTICE, 5, 6.

PRAYER.

Where a bill contains only a special prayer for relief, no other relief can be granted. And if the facts set forth in the bill would not authorize other relief, the prayer will not be amended. *Halsted v. Meeker's Executors*, 136

See PLEADING, 6.

PREROGATIVE COURT.

See JURISDICTION, 8.
PRACTICE, 22.

PRESUMPTION.

See LUNACY, 4.

PRINCIPAL AND AGENT.

See CONTRACT, 22.
DEED, 1, 3, 4.

PROCEEDS OF SALE.

See REAL AND PERSONAL
ESTATE, 1-5.

PUBLIC IMPROVEMENTS.

1. For the purpose of reclaiming large tracts of land, the rights of eminent domain and of taxation may be employed. *Tidewater Company v. Coster*, 518
2. Whether a scheme of improvement be of such public utility as to justify a resort, for its furtherance, to the power of taxation and eminent domain, is a matter to be decided by the legislature. *Ib.*
3. By the charter of "The Tidewater Company," commissioners were to be appointed who were authorized to make a contract with such company, for the draining of large tracts of meadow land, the property of various individuals, said commissioners being also empowered to assess upon said lands, when reclaimed, a just proportion of the contract price—*Held*, that

such scheme was illegal and void, inasmuch as the expense to be levied on the land was not limited in amount to the extent of the benefit to be conferred. *Ib.*

4. The cost of a public improvement may be imposed on the property peculiarly benefited; but the cost beyond this measure must be levied from the public at large. *Ib.*
5. To compel the owner of property to bear the expense of an improvement except to the extent of his particular advantage, is, *pro tanto*, to take private property for public use without compensation. *Ib.*

PURCHASER.

See BONA FIDE PURCHASER.
COVENANT, 1, 3, 4.
EQUITABLE MORTGAGE, 2.
FRAUDS, STATUTE OF, 2.

RAILROAD CHARTER.

1. The several legislative acts giving to the Camden and Amboy Railroad and Transportation Company the exclusive franchise to carry passengers and goods between the cities of New York and Philadelphia, in part by means of a railroad across the state, examined, and held to be constitutional and valid, as a contract between the state and the company. *Rar. & Del. Bay R. Co. v. Del. & Rar. Canal Co.*, 546
2. A state has the exclusive control over the construction and maintenance of railroads and other internal improvements within her own domain. *Ib.*
3. The right to build and use a railroad for the public use, is a franchise, the right to which can be derived from the sovereign only. *Ib.*
4. Such franchise, in its nature and in the absence of express provision, is exclusive, except against the government; so that a competing road, established without

legislative authority, will be enjoined. *Ib.*

5. As a consequence, *held* that the Raritan and Delaware Bay Railroad Company being wrong-doers in diverting their road from their charter route, and in acquiring a right of way to Camden by agreement with the Camden and Atlantic Railroad Company, will have no right, unless they shall acquire supplementary powers, to set up a competing line with the complainants, even after first of January, 1869, when what is called the monopoly privilege of the complainants comes to an end. *Ib.*

6. The injunction against the defendants continued and extended, and the decree of the Chancellor in other respects affirmed. *Ib.*

See CHARTER, 5.

REAL AND PERSONAL ESTATE.

1. The surplus of the proceeds of lands of a decedent, sold by order of the Orphans Court for the payment of his debts, above the amount needed for the payment of debts, retains the character of real estate, and upon the death of the person entitled thereto, will pass by succession, as real estate. So also will the proceeds of lands sold by order of a court on proceedings for partition, because incapable of partition. *Oberly v. Lerch*, 346.

2. Such proceeds retain their character of real estate for the purposes of succession until they vest in some person who is not an infant or lunatic, and who has capacity to change the nature of the estate, and who by accepting it as money, or by some act recognizing it as personal estate, gives it the character of personalty. *Ib.*

3. The income from lands, and the interest on the proceeds of the sale of lands, are personal estate, and will, upon the death of an infant

to whom they belong, be transmitted as such, while the lands, and the proceeds of their sale, pass as real estate, *Ib.*

4. When lands of an infant in another state are sold by partition proceedings there, if by the law of that state the proceeds are to be considered personal estate, and to be transmitted as such, they will pass as such in this state, although they are, at the death of the infant, in the hands of the guardian appointed in this state, and the infant is a resident of this state. *Ib.*

5. When, by an order of the Orphans Court, under the statute, more land is ordered to be sold than is necessary to pay the debts of an intestate, the proceeds of such sale, to the extent of such excess, are not, in legal contemplation, converted into personalty, but will go to the heir-at-law, and if he die under age, will descend to his heirs, the same as the land if unsold would have done. *Ib.* 575

See HUSBAND AND WIFE, 10.
LAND.

RECEIVER.

See BANKING, 9, 10, 11.

REMEDY.

See JURISDICTION, 3, 5.
TRUST FUND, 6.

REPRESENTATION.

See SALE, 1.

RESULTING TRUST.

1. Where one person purchases land for another, and with the money of the other, although he takes the title in his own name, a trust results to the person whose money is paid. So if a guardian, or other trustee, purchase with the money

of the ward or *cestui que trust*, a trust results without being declared in writing. *Johnson v. Dougherty*, 406

2. Where a mother, a married woman, received money for her daughter, and declared that certain lands, purchased by and conveyed to her for about the amount so received, were purchased with that money and for her daughter, the lands will be decreed to be held in trust for the daughter. *Ib.*

See FRAUDS, STATUTE OF.

REVERSION.

See HUSBAND AND WIFE, 9.
WASTM, 3.

REVIEW.

See ADMINISTRATION, 2

ROAD ACT.

See MUNICIPAL CORPORATION, 7.

SALE.

1. A simple representation, at the time of sale, that a lot is valuable and eligible, is but the expression of an opinion, and is never regarded as a warranty. *French v. Griffin*, 279
2. Mere inadequacy of consideration will not avail to set aside a deed, unless accompanied by fraud, or unless it be so gross as to imply fraud. *Weber v. Weiting*, 441
3. A bid of \$100 at a fair public sale, for property worth \$1500, but upon which there were liens, amounting to \$800, there being no pretence of fraud, held not to be so grossly inadequate as to set aside the deed. *Ib.*
4. If a debtor, in failing circumstances, convey his lands for a consid-

eration apparently inadequate, to a creditor in payment of a debt due him, the burthen will be thrown on such creditor to show, by full proof, that such transaction was *bona fide*. *Demarest v. Terhune*, 532

5. If the honesty of such conveyance be left in doubt, the sale will be set aside upon equitable terms. *Ib.*
6. Under the facts of this case, the conveyance was set aside, with directions that the land should be sold; the proceeds of such sale to be applied, in the first place, to pay the debt due to the creditor who held the conveyance, and after the payment of the costs of both parties, to the satisfaction of the judgment of the complainant. *Ib.*

See CONTRACT, 12-14.
FRAUDS, STATUTE OF, 2.
MORTGAGE, 5.

SEPARATE ESTATE.

See HUSBAND AND WIFE, 13-16.
MORTGAGE, 12.

SERVITUDE.

See COVENANT, 4, 5.

SETTLEMENT

See GUARDIAN AND WARD.
PRACTICE, 22.

SHERIFF'S SALE.

1. When a purchase is made at a sheriff's sale, under a parol agreement with the defendant in execution, that he shall be permitted to redeem, he will be entitled to a reconveyance, on paying what may be due to the purchaser. *Marlatt v. Warwick*, 108
2. Inadequacy of price at a judicial sale is not, of itself, sufficient cause to avoid the sale, unless so gross

as to be proof of fraud, or to shock the judgment and conscience. *Ib.*

3. If the plaintiff, at a sheriff's sale, sees that the defendant is under the impression that the plaintiff is purchasing for his benefit, and permits him to remain and act under it, and by means of that impression, and the co-operation of the defendant produced by it, purchases the property at an inadequate price, the purchase will be held to have been made in trust for the defendant. *Ib.*

See CONTRACT, 18-20.

SHORE OWNER.

1. Where an old division line between lands lying on tide water has, for more than forty years, been treated by the owners as extending over the shore, or the lands between high and low water, and regarded as the division line of their right upon the shore, the line so recognized will be established as the line which will govern their rights to reclaim and appropriate the shore under the wharf act. *Stockham v. Browning*, 390
2. No rule for ascertaining the line by which the shore in front of coterminous shore owners shall be divided between them, has been adopted in New Jersey. But if a line claimed by one of them is more favorable to the other than that given by any of the different rules adopted by the courts of the several states, he will be protected to the line so claimed, unless a different line has been adopted by the owners, by acquiescence or otherwise. *Ib.*
3. The owner of lands along tide waters has an easement in the shore in front of them, and the inchoate right to appropriate them to his exclusive use. But until reclaimed, the fee is in the state, and he cannot maintain ejectment. But as he has a vested right in the shore, he will be protected in equity,

against any encroachment on, or appropriation of them. *Ib.*

See CHARTER, 2, 3, 4, 6, 7.
WHARF.

SPECIFIC PERFORMANCE.

Specific performance of a contract for the conveyance of land will not be decreed, unless the property to be conveyed is fixed with certainty, or in such way that it can be ascertained with certainty. If anything is to be done in which the concurrence of both parties is necessary to ascertain the location or quantity of the land, the contract will not be enforced. *C. & A. R. Co. v. Stewart*, 489

See CONTRACT, 3, 5, 9, 17.

STAMP.

See PRACTICE, 3.

STOCKHOLDER.

See CHARTER, 13.
CONTRACT, 11.

STREET.

See HIGHWAYS.
MUNICIPAL CORPORATION.

SURROGATE.

See ADMINISTRATION, 2.

SURVEY.

See NOTICE.

TAXATION.

See PUBLIC IMPROVEMENTS, 1, 2.

TENDER OF PAYMENT.

See DEED, 22-3.

TIDE WATERS.

See CHARTER, 6.
SHORE OWNER.
WHARF, 3.

TIME.

See CONTRACT, 16, 19, 20, 23.
MUNICIPAL CORPORATION, 9.

TITLE.

See DEED, 2, 4.
MORTGAGE, 6.

TITLE DEED.

See EQUITABLE MORTGAGE.

TRESPASS.

See CONTRACT, 18.
INJUNCTION, 1.
MUNICIPAL CORPORATION, 10.

TRUST AND TRUSTEE.

A trustee, who has abused his trust, is entitled to no commissions as trustee, but he will be allowed reasonable compensation for special and extraordinary services rendered to the *cestui que trust*. *Moore v. Zabriskie*, 51

See CONTRACT, 27.
FRAUDS, STATUTE, OF, 2.
RESULTING TRUST.

TRUST FUND.

1. The contributors to a fund, raised and placed in the hands of trustees for a specific purpose, have a right to have any surplus not needed for the object, repaid to them, in proportion to their contributions. The claim is founded in equity, and will be enforced in this court. *Abels v. McKean*, 462
2. The fund is in the control of the association, only for the purposes

for which it was raised. It may be disposed of for any purpose within the object for which it was contributed, at any regular meeting of the association, by the voice of the majority of the members present, even if a minority of the whole number. *Ib.*

3. But the vote must be for some purpose for which the money was contributed. A majority cannot devote the money of the minority, or even of a single member, to any other purpose, without his consent. *Ib.*
4. So, surplus funds, contributed for enlisting men to fill the quota of a city or ward under a call of the President, and to clear the contributors from draft, cannot, by a vote of the majority, be donated to a charitable institution, without the consent of the minority. *Ib.*
5. All persons present at the meeting at which the vote is taken, disposing of the fund, if no one dissents, are considered as voting with the majority for the motion, and assenting thereto; their right to the fund is concluded. *Aliter*, as to those not present. *Ib.*
6. Where, under a resolution of the majority, the surplus fund has passed into the hands of new trustees, between whom and the original contributors there is no privacy, such trustees are not accountable to them for the fund; their remedy is against the original trustees only. *Ib.*

UNILATERAL CONTRACT.

See CONTRACT, 6.

USURY.

1. The payment of illegal brokerage to an agent for effecting a loan, where no part of it is received by the mortgagee, cannot taint the loan with usury. *Conover v. Van Mater*, 481

2. The burthen of proof is on the party setting up the defence of usury. He must establish the facts necessary to constitute it, beyond reasonable doubt, and by a clear preponderance of testimony. *Ib.*
3. Usury is a defence not favored in equity; when the penalty was the forfeiture of the whole debt, it was considered unconscientious. It cannot be so regarded under the act of 1864; but the forfeiture of interest and costs is yet a penalty, and the rule of evidence adopted both at law and in equity, in case of penalties, must be applied. *Ib.*
4. An agreement for the payment of seven per cent. interest, (when such rate is allowed by law,) made in consideration of further forbearance after the mortgage became due, is valid. Subsequent mortgagees take their securities subject to these changes in the law as to those before them. *Ib.*
5. Whether the estate of a reversioner is vested in such manner as to entitle him to sue for waste, and what shall be the rule of damages, are questions proper to be determined in the courts of law. *Ib.*

See HUSBAND AND WIFE, 8.

WHARF.

1. A right given by the legislature to the owner of the shore on navigable water, to build a wharf in front of his land, does not, by implication, carry with it a right to have, as against the adjoining proprietors, the water-space kept open so that vessels can be moved along the sides of such wharf. *Keyport Steamboat Co. v. Farmers Transportation Co.*, 511
2. Nor does the fact that it is highly convenient for vessels in turning to use an open space at the side of such wharf, preclude the owner of the contiguous water-front from extending such front, by force of a legislative license, so as to interfere with such use. *Ib.*

3. The decisions heretofore made in this state, appear to be based on the concession, that unless the land under the flow of tidewater, has been actually reclaimed, it belongs, as property, to the public, and as such is subject to the uncontrollable proprietorship of the state; and this doctrine appears to be sustained by the current of decisions in the United States. *Ib.*

See CHARTER, 2, 3, 4, 10.

WIFE'S EARNINGS.

See HUSBAND AND WIFE, 15, 16.

VENDOR AND PURCHASER..

See CONTRACT, 10.

VOLUNTARY SETTLEMENT.

See MARRIAGE SETTLEMENT.

WAIVER.

See CONTRACT, 3.

WARRANTY.

See SALE, 1.

WASTE.

1. Improvements by a life tenant are no excuse or justification for committing waste; more especially when the waste is to the inheritance, and the improvements are to the fertility of the soil, which may be exhausted during the life estate. *Van Syckel v. Emery*, 387

WILL.

1. N. M., by his will, gave to his executors, in trust, as follows: "With the balance of my estate which may remain after executing the foregoing trusts, to establish, as soon as may be practicable after my decease, in what is now known as the fifth ward of said city of Newark, an orphan asylum, to be called St James Roman Catholic Orphan Asylum, and also a hospital for sick and infirm persons. And my executors, or the survivor of them, shall, as soon as may be practicable after the institutions shall have been established, cause them to be incorporated, one corporation for both institutions, and shall convey to the corporation, when created, all the property belonging by assignment or appropriation of said executors, or the survivor of them, to the institutions. In the meantime, and until such incorporation, such executors, or the survivor of them, shall have the management of the institution."

Held, that the right to establish these institutions for the purpose specified is in the executors. They are not bound to put them under the direction of the Roman Catholic Church, or its bishop, or prelates; or to cause the worship of that church to be adopted, or its tenets to be taught exclusively, or at all, except as their own judgment impels them. *Attorney General v. Moore's Executors*, 257

2. Samuel Sharp, by his will, dated January first, 1860, devised lands to his daughter, Margaret McPeck, and charged them with a legacy of \$200 to his daughter, Eliza Durling, and her two children. By a codicil, dated the thirty-first of March following, he directed that, "in case Maria Durling and her children should choose to remain with me until the time of my decease, that then or in that case, she or they pay the sum of \$100 for each and every year she or they do remain, from the second day of April next ensuing the date here-

of, said \$100 for every year to be deducted from their legacies bequeathed to them; the time of their remaining, if at all, not to exceed three years from the date hereof." To a bill for the payment of the legacy, setting out that Eliza Durling and her children had, for years prior to the date of the will, been living in the testator's house, and had various privileges upon the farm, and continued living in the same manner until the testator's death, without notice of the provisions of the will or codicil, and without opportunity of making her election, the defendants demur.

Held, that the words in the codicil, "choose to remain," mean choosing to remain rather than go away, not choosing between remaining and the legacy. Demurrer sustained. *Durling v. McPeck*, 263

3. M. C., by the residuary clause of her will, gave a certain bond and mortgage, and certain shares of stock, to her daughter E. and her son J., to be divided between them, share and share alike. E. afterwards married and made a will, leaving all her property, real and personal, to her husband. The husband filed a bill against the executors of M. C., and her son J., for the payment to him of one half of the principal of the bond, and of the shares of stock, as well as of the interest and dividends, respectively accrued thereon, since the death of E. The defendants dispute the claim, and insist that J. is entitled to the whole thereof, as next of kin.

Held, that E. was entitled to one half of the principal of the mortgage, and of the shares of stock, upon the death of M. C. She could dispose of her interest in them by will; or if she had died intestate, it would belong to her husband, under the statute of distributions. Complainant entitled to the funds. *Richards v. Clark's Executors*, 327

4. Under the act of 1851 (*Nix. Dig.* 917,) there are four requisites to a valid will: 1. That it be in

writing. 2. That it be signed by the testator. 3. That such signature shall be *made by the testator*, or the *making thereof* acknowledged by him in the presence of two witnesses. 4. That it shall be declared to be his last will in the presence of these witnesses. *In re McElwaine*, 499

5. It is not sufficient that the signature be made by another, though at the request, and in the presence of the testator. *Ib.*

6. Where there is no proof as to the making of the signature, such acknowledgment is sufficient evidence that the testator made it, and would prove compliance with the requisite of signing by him. *Aliter*, when it is clear that he did not sign the will. *Ib.*

See EVIDENCE, 4.

WITNESS.

See EVIDENCE, 3, 5, 6, 8, 9.





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